(24,665)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 106.

FURNESS, WITHY & COMPANY, LIMITED, PETITIONER,

vs.

YANG-TSZE INSURANCE ASSOCIATION, LIMITED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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a RETURN TO CERTIORARI.

United States Circuit Court of Appeals for the Second Circuit.

YANG-TSZE INSURANCE ASSOCIATION, LIMITED, et al., Libellants-Appellees,
against
FURNESS, WITHY & COMPANY, LIMITED, Respondent-Appellant,

And 14 Other Cases.

Transcript of Record.

Appeal from the United States District Court for the Southern District of New York.

1 United States District Court, Southern District of New York.

YANG-TSZE INSURANCE ASSOCIATION, LIMITED, et al., Libellant,
against
FURNESS, WITHY & COMPANY, LIMITED, Respondent,

And 14 Other Cases Against Same Respondent.

Statement.

1912.
Feb. 27. Yang-tsze, &-., libel filed.
July 1. Order amending libel filed.
July 2. Nord-deutsche, &c., libel filed.
Aug. 13. Order amending libel filed.
Oct. 8. Answer to Yang-tsze libel filed.
Oct. 8. Answer of Nord-deutsche, &c., libel filed.
Oct. 11. Despard, Coleman, Weidensaul, Van Praag, Orr, Moore and Bertschmann libels filed.
Oct. 30. Boston, &c., libel filed.
Nov. 15. Answers to Coleman, Weidensaul, Van Praag, Moore and Bertschmann libels filed.
2
Nov. 19. Answers to Despard and Orr libels filed.
Nov. 20. Answer to Boston, &c., libel filed.
Dec. 3. Federal, &c., libel filed.
1913.
Jan. 8. Answer to Federal, &c., libel filed.
Jan. 8. United States libel filed.
Jan. 9. Answer to U. S. libel filed.
Jan. 13. Case tried before Hand, J.

Mch. 26. Opinion, Hand, J., filed.
Apl. 23. Oloffsan, Silvera and Hazan & Co., libels filed.
June 4. Order of substitution.
June 13. Final decree for libellants entered.
June 18. Notice of appeal filed.
Oct. 2. Assignments of error filed.

3 To the Judges of the United States District Court for the Southern District of New York:

The libel of the Yang-tsze Insurance Association, Limited, and Herbert Appleton and Douglas F. Cox, attorneys-in-fact for the subscribers at the United States Lloyds, and the Indemnity Mutual Marine Assurance Co., Ltd., against Furness, Withy & Company, Limited, and Hamburg-Amerikanische Packetfahrt Actien-Gesellschaft, in a cause of collision, civil and maritime, alleges as follows:

First. At all the times hereinafter mentioned the libellant, Yangtsze Insurance Association, Limited, was and it is a corporation organized under the laws of the Colony of Hong Kong, and is engaged in the business of Marine Insurance, with an office for the transaction of business at No. 3 South William Street, in the Borough of Manhattan, City of New York.

Second. At all the times hereinafter mentioned Herbert Appleton and Douglas F. Cox were and they are attorneys-in-fact for one hundred individual marine underwriters, as subscribers at United States Lloyds, and are authorized in their behalf to prosecute this suit. The United States Lloyds has an office for the transaction of business at No. 3 South William Street, in the Borough of Manhattan, City of New York.

Third. At the times hereinafter mentioned, the Indemnity Mutual Marine Assurance Company, Ltd., was and it is a corporation organized under the laws of Great Britain and Ireland and it is engaged in the business of marine insurance with an office in New York.

4 Third-*a*. At all the times hereinafter mentioned, the respondent, Furness, Withy & Company, Limited, was and it is a foreign corporation organized under the laws of the Kingdom of Great Britain and Ireland, and was and is the sole owner of the British steamship Pomaron. Said respondent has property, credits and effects within this district.

Fourth. At all the times hereinafter mentioned, the respondent, Hamburg-Amerikanische Packetfahrt Actien-Gesellcschaft, commonly called the Hamburg-American Line, was and it is a corporation organized under the laws of the Empire of Germany, and was sole owner of the German steamship Alleghany. Said respondent has property, credits and effects within this district.

Fifth. On or about January 31, 1912, Huttlinger & Struller, at New York, shipped in good order and condition on board the steamship Alleghany, bound from New York to ports in Haiti and other ports in the West Indies and South America, the following mentioned merchandise:

5 packages and 1 case of various articles marked Mme. L. G.

(H & S) Jeremie consigned to Mandame L. Gaveau at Jeremie, of
C. M.
the value of $98.68; 1 case marked (H & S) consigned to Clement
Pau P.
Magloire, at Port au Prince, of the value of $29.01; 29 packages of
A B L
various merchandise marked (H & S) consigned to A. Labissier,
Aux Cayes
5 at Aux Cayes, of the value of $323.58; 7 packages of mer-
R. D. Co.
chandise of various kinds, marked L R consigned to Roberts,
(H & S)
Aux Cayes
Dutton & Co. at Aux Cayes, of the value of $137.64; 91
D S
ESTOR
packages of merchandse of various kinds marked (H & S)
Petit Coave
consigned to D. Siclait at Petit Coave, of the value of $732.22;
D S
F F
45 packages of merchandise of various kinds, marked (H & S)
Petit Coave
consigned to D. Siclait at Petiti Coave, of the value of
$409.81; 774 packages of merchandise of various kinds, marked
F. H. & Co.
E A H
(H & S) consigned to F. Hermann & Co. at Port au Prince, of the
P. au P.
value of $5,408.89; 62 packages of merchandise of various kinds,
F. H. & Co.
J T
marked (H & S) consigned to F. Hermann & Co. at Port au Prince,
P. au P.
of the value of $854.86; 14 packages of merchandise of various kinds,

		S T	S P
	E. Blanchard	T M L	V C M
marked respectively,	(H & S)	(H & S)	(H & S)
	Pt. au P.	Pt. au P.	P. au P.

6 consigned to d Ennery Dejois at Port au Prince, of the value
of $168.26; 4 packages of merchandise of various kinds,
B N R H
marked (H & S) consigned to the Banque Nationale de la Republic
P. au P.
d'Haiti, at Port au Prince, of the value of $109.21; 31 packages of
L. P. & Co.
merchandise of various kinds, marked (H & S) consigned to L.
P. au P.
Pelout & Co., at Port au Prince, of the value of $298.78; 8 packages

L V L
of merchandise of various kinds, marked (H & S) consigned to
P. au P.
L. V. Longendonck, at Port au Prince, of the value of $188.87; 2
Consul de France
E R
packages of merchandise of various kinds, marked (H & S) con-
Pt. au P.
signed to Monsieur Saroye, Consul of France, at Port au Prince, of the value of $45.85.

On or about February 1, 1912, the Central Railroad of Haiti shipped on board the Alleghany at New York 1 package of samples of the value of $93.98, and 49 packages of different kinds of merchandise of various marks, of the value of $241.11. Freight thereon amounting to $28.64 was prepaid.

The aggregate value of all the aforesaid merchandise was $9,140.73.

The Hamburg-American Line duly issued its bills of lading for the aforesaid several parcels of merchandise, reciting the shipment thereof on board the steamer, and agreeing to transport and deliver the same to the several consignees at the several ports of des-
7 tination above set forth. The freight on the said shipments was paid in advance at New York, amounting to $1,097.69.

Sixth. On or about January 5, 1912, at Liverpool, Cohen & Co. shipped on board the steamship Laurentic, bound for New York, 20 packages of various kinds of merchandise, marked respectively L. NYH M L S A D F consigned to Emil L. Boaz, General Manager
Inagua
Hamburg-American Line, at New York, for transshipment to Inagua, Bahama Islands. Said merchandise was of the value of $631.33. A through bill of lading was duly issued for this merchandise by the agents of the Hamburg-American Line, in London, and the merchandise therein mentioned was duly transshipped at New York on board the steamship Alleghany on or about January 31st, 1912. Freight on said shipment, amounting to $37.44 was prepaid.

Seventh. Cohen & Company, at New York, also shipped on the steamship Alleghany certain other cargo for the port of Inagua, as follows:

The L. & N. Y. H.
20 packages of merchandise of various kinds, marked Inagua consigned to W. W. Richardson, of the value of $122.13; 16 packages
J. E. S.
of merchandise of various kinds, marked Inagua, consigned to James E. Seymour, of the value of $118.32; 20 packages of mer-
M. L. S.
chandise of various kinds, marked Inagua, consigned to
8 Maybell Symmonett, of the value of $96.48; 9 packages of
A. D. F.
merchandise of various kinds, marked Inagua, consigned to

A. D. Farquharsen, of the value of $61.08; 4 packages of mer-
S. T.
chandise of various kinds, marked Inagua, consigned to Maybell Symmonett, of the value of $31.73; 2 packages of merchandise of
S.
various kinds, marked Inagua, consigned to Maybell Symmonett,
G. H. R.
of the value of $10.16; 1 case of merchandise, marked Inagua, consigned to George H. Russell, of the value of $6.55; 2 barrels of
A. W. I.
merchandise, marked Inagua, consigned to A. W. Graham, of the value of $13.62.

The aggregate value of the consignments shipped by Cohen & Co., as aforesaid, amounts to $460.07.

The Hamburg-American Line duly issued its bills of lading for the aforesaid several parcels of merchandise, reciting the shipment thereof, on board the steamer, and agreeing to transport and deliver the said several shipments at Inagua to the consignees therein mentioned, as above set forth Freight on the said cargo was prepaid in New York, amounting to $39.77.

Seventh. (*a*) Huttlinger & Struller, on behalf of France, Gonzales & Co., of Barranquilla, Colombia, S. A., at New York, shipped on board the Alleghany, on or about January 31, 1912, 250 pack-
Franzales
ages of merchandise of various kinds, marked Barranquilla, consigned to France, Gonzales & Co. at Savanilla, of the value of $2,139.05.

9 The Hamburg-American Line duly issued its bill of lading for the aforesaid merchandise, reciting the shipment thereof on board the steamer, and agreeing to transport and deliver the same to the port and consignees above stated. Freight in the sum of $116.09 was prepaid.

Eighth. On January 30, 1912, the Kny-Scheerer Company, at New York, shipped on board the Alleghany 1 case of merchandise
K
N NY P
marked 55086 consigned to H. Berg & Co., at Puerto Colombia,
Bogota
via Barranquilla
of the value of $100.

The Hamburg-American Line duly issued its bill of lading therefor, reciting the shipment thereof on board the steamer, and agreeing to transport and deliver the same to the port and consignees above stated. Freight in the sum of $6.37 was prepaid.

Ninth. On or about January 31, 1912, N. C. D. Borden, shipped on board the Alleghany 40 bales of cotton domestics, numbered 174-202 inclusive, 109-118 inclusive, and 355, to be delivered at the port of Cartagena, on the order of the owners. Said shipment was of the value of $4,698.

On or about January 31, 1912, the Carter Ink & Mucilage Com-

pany shipped on board the Alleghany 10 packages of ink and mucilage to be delivered at the Port of Barrancabermeja via Cartagena on the order of the owners. Said shipment was of the value of $35.

The Hamburg-American Line duly issued its bills of lading for the aforesaid merchandise shipped by M. C. D. Borden and by the Carter Ink & Mucilage Company, reciting the shipment thereof, on board the steamer, and agreeing to transport and deliver the same to the port and consignees above stated. Freight on said shipments amounting to $86.34 was prepaid.

Tenth. On or about January 31st, 1912, The Vacuum Oil Company, shipped on board the steamship Alleghany at New York, 10 barrels of lubricating oil of the value of $210 for delivery at Port au Prince on the order of the owner.

On or about January 31st, 1912, Achille Starace shipped on board the Alleghany at New York, three cases of merchandise of various kinds, marked $\frac{A\ S}{G\ M}$ $\frac{}{P\ au\ P}$ of the value of $399.02 for delivery to order at Port au Prince.

On or about January 31st, 1912, Achille Starace shipped on board the steamship Alleghany at New York, 2 cases containing merchandise of various kinds, marked $\frac{A\ S}{P\ R}$ $\frac{}{P\ au\ P}$ of the value of $438.39 for delivery to order at Port au Prince.

On or about January 31st, 1912, Achille Starace shipped on board the steamship Alleghany at New York, three packages of merchandise of various kinds, marked $\frac{A\ S}{G\ C}$ $\frac{}{P\ au\ P}$ of the value of $525.84 for delivery to order at Port au Prince.

On or about January 31st, 1912, Achille Starace shipped on board the Alleghany, at New York, by parcels post in the United States mail, one parcel containing merchandise of various kinds, of the value of $13.09 addressed to A. De Matteis & Co., Port au Prince.

For the different shipments of merchandise referred to in this tenth paragraph of the libel, except the parcels post package, the Hamburg-American Line duly issued its bills of lading reciting the shipment of the cargo mentioned on board the steamer and agreeing to transport and deliver the same at the port and to the consignees above stated. The freight on all the shipments was prepaid as follows: On the shipments of the Vaccum Oil Company, $30.52; on the shipments of Achille Starace, $21.71.

Eleventh. On February 2, 1912, shortly after 11 o'clock A. M. while the Alleghany was bound on the voyage to the ports aforesaid, she came into collision with the steamship Pomaron at a point about 90 miles east of Cape Henry, the Alleghany sustaining such injuries that she afterwards sank, causing a total loss of all her

cargo. The libellants have no means of knowing precisely the circumstances of the collision, but they are informed and allege that shortly prior to the collision the Alleghany was standing on a course of approximately south, and the Pomaron was standing on a course approximately east. The wind was high, the sea rough, and both vessels were proceeding at full speed through falling snow, without sounding signals as required by Article 16 of the International Rules. The vessels were on crossing courses, and the Alleghany had the Pomaron on her own starboard hand. Nevertheless, after learning of the presence and approach of the Pomaron, the Alleghany starboarded her helm in an effort to cross the course
12 of the Pomaron, and neglected to stop and reverse in due season. The Pomaron, after learning of the presence and approach of the Alleghany on her port hand, at first gave a single short blast on her whistle, without making a corresponding change of helm, and afterwards, when the vessels were closer together, improperly changed her course and speed so as to bring about a collision with the starboard side of the Alleghany, at about a right angle. Neither vessel sounded reversing signals, or other appropriate signals to indicate their intended manœuvres when the risk of collision arose.

The loss of the cargo describel in the libel was not caused nor contributed to by any fault on the part of the libellant, but was caused or contributed to by faults on the part of said steamers as follows:

a. On the part of the Pomaron:

1. In that a good lookout was not maintained.

2. In that the steamer was proceeding at an immoderate rate of speed in falling snow, without sounding the whistle signals required by law.

3. In that, after sighting or learning of the approach of the Alleghany on her own port hand, she sounded a single short blast on her whistle, without making a corresponding change of course, and subsequently, when the vessels were close together, she made a change of course and speed that caused her to swing into the starboard side of the Alleghany, without indicating her manœuvres by appropriate whistle signals.

4. In that she failed to hold her course and speed.

5. In that, in consequence of thick weather or other cause, she found herself so close to the Alleghany that collision could not be avoided by the action of that vessel alone, yet failed to take
13 such action as would have best aided to avert collision, by reversing her engines seasonably, and by swinging away from instead of toward the position of the Alleghany.

6. In other respects to be shown at the trial.

b. On the part of the Alleghany:

1. In that a good lookout was not maintained.

2. In that the steamer was proceeding at an immoderate rate of speed, in falling snow, without sounding the whistle signals required by law.

3. In that she failed to keep out of the way of the Pomaron after sighting the latter vessel.

4. In that, after sighting, or otherwise learning of the approach of the Pomaron on her own starboard hand, so as to involve risk of collision, she starboarded her helm in an effort to cross ahead of the other vessel, and failed to stop and reverse seasonably.

5. In that she failed to sound whistle signals, indicating her manoeuvre immediately before the collision, in seasonable time, and altogether omitted the reversing signal.

6. In other respects to be shown at the trial.

Twelfth. The various shipments referred to in detail in paragraph Fifth hereof, aggregating in value the sum of $9,140.73, together with the prepaid freight thereon amounting to $1,097.69, were fully insured by the owners thereof under marine policies issued by the libellant, Yang-tsze Insurance Association, Limited, against marine perils during the said voyage of the Alleghany. Under said contracts of insurance, the libellant, Yang-tsze Insurance Association, Limited, became liable for the losses sustained by the owners of said cargo, in consequence of the loss of the Alle-
14 ghany, as aforesaid, and have paid, or become liable to pay for the benefit of the respective owners of the said shipments, the amounts necessary to indemnify them for their damages sustained by reason of the collision; namely, the amounts of the values of the said several shipments as set forth in paragraph Fifth hereof, amounting in the aggregate to $9,140.73, together with the prepaid freight thereon amounting to $1,097.69, and have succeeded by right of subrogation and assignment to the rights of the owners of said shipments respectively to sue for and recover the same herein.

Thirteenth. The various shipments referred to in detail in paragraphs Sixth to Ninth hereof, inclusive, aggregating in value the sum of $8,063.45, together with the prepaid freight thereon, amounting to $286.01, were fully insured by the owners thereof, under marine policies issued by the libellant United States Lloyds, against marine perils during the said voyage of the Alleghany. Under said contract of insurance, the libellant, United States Lloyds, became liable for the losses sustained by the owners of said cargo, in consequence of the loss of the Alleghany, as aforesaid, and have paid, or become liable to pay for the benefit of the respective owners of the said shipments, the amounts necessary to indemnify them for their damages sustained by reason of the collision; namely, the amounts of the values of the said several shipments as set forth in paragraphs Sixth to Ninth hereof, inclusive, amounting in the aggregate to $8,063.45, together with the prepaid freight as aforesaid, and have succeeded by right of subrogation and assignment to the rights of the owners, and the libellants Herbert Appleton and Douglas
15 F. Cox, as attorneys-in-fact for the subscribers of the United States Lloyds, are entitled to sue for and recover the same herein.

Fourteenth. The various shipments referred to in detail in paragraph Tenth hereof, aggregating in value the sum of $1,586.34 together with the prepaid freight thereon, amounting to $52.23, were

fully insured by the owners thereof under marine policies issued by the libellant, The Indemnity Mutual Marine Assurance Company, Limited, against marine perils during the said voyage of the Alleghany. Under said contracts of insurance, the libellant, The Indemnity Mutual Marine Assurance Company, Limited, became liable for losses sustained by the owners of said cargo in consequence of the loss of the Alleghany, as aforesaid, and have paid or become liable to pay, for the benefit of the owners of the respective shipments, the amounts necessary to indemnify them for their damages sustained by reason of the collision, viz., the amounts of the values of the said shipments as set forth in paragraph Tenth hereof, amounting in the aggregate to $1,586.34, together with the aforesaid prepaid freight thereon, $52.23 and have succeeded by right of subrogation and assignment of the rights of the owners of said shipments respectively to sue for and recover the same herein.

Fifteenth. The respondent, Furness, Withy & Company, Limited, is a foreign corporation, and, as libellants are informed and believe, none of its officers or directors reside or is within this district. Said respondent, however, has certain property within the district, the

16 British steamship Richmond, her engines, boilers, tackle, apparel and furniture, of which the respondent, Furness, Withy & Company, Limited, is sole owner.

Sixteenth. All and singular the premises of this libel are true and within the Admiralty and Maritime jurisdiction of this Honorable Court.

Wherefore, the libellants pray that process may issue with clause of foreign attachment against the respondent, Furness, Withy & Company, Limited, citing it to appear and answer in the premises, and further commanding the Marshal of this district, in case the said respondent cannot be found, within the district, to attach its said steamship Richmond, her engines, boilers, tackle, apparel and furniture, and that process may also issue citing the respondent, Hamburg-Amerikanische Packetfahrt Actien-Gesellschaft, to appear and answer the libellants in the premises, and that a decree may be entered against the said respondents, in favor of the libellants, Yang-tsze Insurance Association, Limited, in the sum of $10,219.40, in favor of Herbert Appleton and Douglas F. Cox, attorneys-in-fact for the subscribers at the United States Lloyds, in the sum of $8,349.46, and in favor of the Indemnity Mutual Marine Assurance Company, Limited, in the sum of $1,638.57, making together $20,207.43, with interest thereon and the costs of this action, or that the Court will make such other or different decree as the justice of the cause may require.

CONVERS & KIRLIN,
Proctors for Libellants.

17 SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

John C. Eustace, being duly sworn, says:

That the corporation of Willcox, Peck & Hughes is the agent in

New York of the Yang-tsze Insurance Association, Limited, one of the libellants herein; that he is Vice-President of the corporation of Willcox, Peck & Hughes, and that the foregoing libel is true to the best of his knowledge, information and belief.

The sources of his information and the grounds of his belief are derived from reports and claims made to and upon the libellants by the shippers, consignees and owners of the cargo hereinbefore mentioned, or their representatives.

JOHN C. EUSTACE.

Sworn to before me this 27th day of February, 1912.

JOHN L. GAYLEY,
Notary Public, Kings Co., New York County.

[Endorsed:] Libel filed February 27, 1912.

18 At a Stated Term of the United States District Court for the Southern District of New York, Held at the Court Rooms Thereof, in the Post Office Building, Borough of Manhattan, City — New York, on the 27th Day of June, 1912.

Present: Hon. Learned Hand, United States District Judge.

YANG-TSZE INSURANCE ASSOCIATION, LIMITED, and HERBERT Appleton and Douglas F. Cox, Attorneys-in-fact for the Subscribers at the United States Lloyds, and the Indemnity Mutual Marine Assurance Company, Limited, Libellants,

against

FURNESS, WITHY & COMPANY, LIMITED, and HAMBURG-AMERIKANISCHE PACKETFAHRT ACTIEN-GESELLSCHAFT.

Order Amending Libel.

On the underwritten consent and on motion of Convers & Kirlin, proctors for all the libellants in the above-entitled libel, it is hereby

Ordered that the libel heretofore filed herein be and it hereby is amended in the following particulars:

19 First. In Article Tenth of the libel, between the fifth and sixth paragraphs of that article, insert a paragraph in these words:

"On or about January 30, 1912, Achille Starace shipped on board the steamship Alleghany, at New York, one case of leather goods and

A. S.

shoe findings, marked N. M. of the value of $223.84, for delivery

P au P

to order at Port au Prince."

Second. In Article Fourteenth of the libel change the amount, "$1,586.34" so as to read "$1,810.18," wherever the said amount appears in that article.

Third. In the wherefore clause change the amount, $10,219.40"

so as to read "$10,238.42"; change the amount "$1,638.57" so as to read "$1,862.41"; and also change the amount, "$20,207.43," so as to read "$20,450.29."

LEARNED HAND, *D. J.*

We consent to the entry of the foregoing order.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Furness, Withy & Company, Limited.

[Endorsed:] Order amending libel, entered July 1, 1912.

20 To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The answer of Furness, Withy & Company, Limited, to the libel of the Yang-tsze Insurance Association, Limited, Herbert Appleton, Douglas F. Cox and the Indemnity Mutual Marine Assurance Company, Limited, in a cause of collision, civil and maritime, alleges as follows:

First. The respondent admits the first, second, third, third-*a*, and fourth articles of the libel.

Second. The respondent denies any knowledge or information sufficient to form a belief as to the fifth, sixth, seventh, seventh-*a*, eighth, ninth and tenth articles of the libel.

Third. The respondent admits that on February 2, 1912, shortly after 11 o'clock A. M. the Alleghany and the Pomaron were in collision at a point about 100 miles east of Cape Henry, that the Alleghany afterwards sank, that shortly prior to the collision the Alleghany was on a course approximately south and the Pomaron was on a course approximately east; that the vessels were on crossing courses and the Alleghany had the Pomaron on her own starboard hand; that the Pomaron gave a single short blast signal. The respondent denies that the vessels were proceeding through falling snow and further denies each and every allegation of fault on the part of the Pomaron contained in the eleventh article of the libel.

Fourth. The respondent denies any knowledge or information sufficient to form a belief as to the twelfth, thirteenth and fourteenth articles of the libel.

Fifth. The respondent admits the fifteenth article of the libel.

21 Sixth. The respondent admits jurisdiction and denies the other allegation of the sixteenth article of the libel.

Seventh. Further answering, the respondent alleges as follows:

The respondent is a corporation created by and existing under the laws of the United Kingdom of Great Britain and Ireland and is the owner of the British steamship Pomaron, which is a steel screw steamship of 1,809 tons gross, 1,127 tons net, 278 feet long, 40.5 feet beam and 20.5 feet in depth of hold. Until the collision the Pomaron was tight, staunch, strong and in all respects seaworthy.

On February 1, 1912, the Pomaron left Baltimore bound for Leith laden with grain and general cargo. She passed Cape Henry between midnight and 1 A. M. on the 2nd, and set a course E. by N. ¼ N. magnetic, her compass course being E. by N., which course she maintained until just before the collision. The weather was fine and clear and the wind a moderate breeze from the west. The ship was making about nine knots an hour.

About 10.35 A. M. the first officer of the Pomaron, who was in charge of her navigation, sighted on the port bow a steamship, distant about ten miles, which was apparently steering a course about south. The bearing of this vessel, which proved to be the Alleghany, did not change as she approached, but the Pomaron kept her course and speed until she saw that the Alleghany was doing nothing whatever to keep out of the way of the Pomaron. The first officer of the Pomaron, therefore blew one blast of his whistle and at the same time ordered the helm a little to port. Shortly afterwards the Alleghany suddenly blew a signal of two blasts
22 indicating that she was directing her course to port with the intention of crossing the Pomaron's bows. Seeing that a collision was inevitable, the first officer of the Pomaron ordered the engines full speed astern and the helm put hard-a-port in an effort to ease the blow. The Alleghany kept on at full speed across the Pomaron's bows, at the last moment swinging apparently under a starboard helm, and the vessels came together, the Pomaron's stem striking the Alleghany a glancing blow on her starboard side abaft the engine room. The way of the Pomaron was almost checked at the time of the collision, but the Alleghany was swinging rapidly to port and went on at full speed for some distance. The Pomaron stood by to render assistance and took all the crew and passengers on board when it was found that the Alleghany was sinking.

Eighth. By reason of the collision the Pomaron was seriously damaged, her bow and stem being twisted to starboard, her port anchor lost and many of her plates and frames broken.

Ninth. The collision was not caused or contributed to by any negligence on the part of the Pomaron or of those in charge of her, but was due solely to the negligence of the Alleghany in the following respects, among others:

1. In that a good lookout was not maintained.

2. In that there was no officer or any competent person in charge of her navigation for some time prior to the collision.

3. In that although she had the Pomaron on her starboard hand she did not keep out of the way of the Pomaron.

4. In that she made no change of course until too late to avoid a collision.

23 5. In that she starboarded her helm, and attempted to cross the Pomaron's bows.

6. In that she did not port her helm or stop and reverse in time to avoid a collision.

7. In that she did nothing to avoid a collision.

All and singular the premises are true.

Wherefore the respondent prays that the libel herein may be dismissed with costs.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Respondent.

SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

Charles C. Burlingham, being duly sworn says: I am a member of the firm of Burlingham, Montgomery & Beecher, proctors for the respondent herein. I have read the foregoing answer and the same is true to the best of my knowledge, information and belief. The sources of my knowledge and information are statements by the master, officers and crew of the Pomaron. The reason why I make this verification is that the respondent is a foreign corporation none of whose officers is within the City of New York.

CHARLES C. BURLINGHAM.

Sworn to before me this 8th day of October, 1912.
[SEAL.] CHAUNCEY I. CLARK,
Notary Public, Kings County.

Certificate filed in New York County.

[Endorsed:] Answer filed October 8, 1912.

24 To the Honorable the Judges of the United States District Court for the Southern District of New York:

The libel of Nord-Deutsche Insurance Company, Union Insurance Society of Canton, Limited, Commercial Union Assurance Company, Limited, The Corporation of Lloyds and Ætna Insurance Company, against Furness, Withy & Company, Limited, and Hamburg-Amerikanische Packefahrt Aktien-Geselschaft, in a cause of collision, civil and maritime, alleges on information and belief as follows:

First. At all the times hereinafter mentioned, the libellant, Nord-Deutsche Insurance Company, was and it still is a corporation organized and existing under the laws of the German Empire, and is engaged in the business of marine insurance, with an office for the transaction of business at 3 South William Street, in the Borough of Manhattan, City of New York.

Second. At all the times hereinafter mentioned, the libellant, Union Insurance Society of Canton, Limited, was and still is a corporation duly organized and existing under the laws of the Colony of Hong Kong, and is engaged in the business of marine insurance, with an office for the transaction of business at 3 South William Street, in the Borough of Manhattan, City of New York.

Third: At all the times hereinafter mentioned, the libellant, Commercial Union Assurance Company, Limited, was and still is a corporation, duly organized and existing under the laws of the

United Kingdom of Great Britain and Ireland, and is engaged in the business of marine insurance, with an office for the transaction of business at 51 Wall Street, Borough of Manhattan, New York City.

25 Fourth. At all the times hereinafter mentioned, The Corporation of Lloyds was and it still is a corporation duly organized and existing under the laws of the United Kingdom of Great Britain and Ireland, and is engaged in the business of marine insurance, with an office for the transaction of business at 66 Beaver Street, in the Borough of Manhattan, City of New York.

Fifth. At all the times hereinafter mentioned, the libellant, Aetna Insurance Company, was and it still is a corporation duly organized and existing under the laws of the State of Connecticut, and is engaged in the business of marine insurance, with an office for the transaction of business at 63 Beaver Street, Borough of Manhattan, City of New York.

Sixth. At all the times hereinafter mentioned, the respondent, Furness, Withy & Company, Limited, was and it still is a foreign corporation, organized under the laws of the United Kingdom of Great Britain and Ireland, and it was and is the sole owner of the British steamship Pomaron. The said respondent has property, credits and effects within this district.

Seventh. At all the times hereinafter mentioned, the respondent, Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft, commonly called the Hamburg-American Line, was and it still is a foreign corporation organized and existing under the laws of the German Empire, and it was the sole owner of the German steamship Alleghany. Said respondent has property, credits and effects within this district.

26 Eighth. On or about February 1, 1912, at New York, Armour & Co. shipped in good order and condition on board the steamship Alleghany, bound from New York, to Port au Prince, the following 51 Packages of merchandise: 5 tierces Mess Pork, 20 bbls. Mess Pork; 2 tierces Whitecloud; 5 tierces Melrose Ex. Family Beef; 10 cases Whitecloud, 5 cases Whitecloud, 1 case Shield Lard, J T
1 case Shield Lard, 2 bbls. Shield Lard, marked "Port au Prince," consigned to the order of Armour & Company at Port au Prince. Freight on the said shipment in the sum of $71.42 was prepaid at New York. The aggregate value of the 51 packages of merchandise aforesaid, including the prepaid freight, was $1,050.

The Hamburg-American Line duly issued its bill of lading for the said 51 packages of merchandise, reciting the shipment thereof on board the steamship Alleghany, and agreeing to transport and deliver the same unto the order of Armour & Co. at Port au Prince.

Ninth. On or about January 10, 1912, at Liverpool, Purgold & Co. shipped on board the steamship Cedric, bound for New York, C V
19 packages of various kinds of merchandise marked P 121, 150/3, Aux Cayes
154, 151, 161/2, 21/30 respectively, consigned to Emil L. Boas,

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General Manager Hamburg-American Line at New York, for transhipment to Aux Cayes, there to be delivered to the order of C. Voigt.

On or about January 10, 1912, at Liverpool, Walter Roughton shipped on board the steamship Cedric, bound for New York, two other packages of various kinds of merchandise D S marked Petit Goave 21 and 49 respectively, consigned to Emil L. Boas, General Manager, Hamburg-American Line, at New York, for transshipment to Petit Goave, there to be delivered to the order of D. Siclait. Freight on the aforesaid 21 packages in the sum of £6:11:11, or, at the exchange rate of $4.8665, $32.10, was prepaid at Liverpool. The value of the aforesaid 21 packages of Merchandise, including the prepaid freight, was £75, which, at the exchange rate of $4.8665, is $364.99.

Through bills of lading were duly issued for this merchandise by the agents of the Hamburg-American Line in Liverpool, and the merchandise therein mentioned was duly transshiped at New York on board the steamship Alleghany on or about January 31, 1912.

Tenth. On or about February 1, 1912, at New York, Daniel Miller Company shipped in good order and condition on board the steamship Alleghany, bound from New York to Port au Prince, two cases O L & C of dry goods marked D M C 193 and 3710 respectively, consigned Port au Prince to Oloffson, Lucas & Co., at Port au Prince. Freight on the said shipment in the sum of $12.36 was prepaid at New York. The value of the said two cases, including the prepaid, was $230.

The Hamburg-American Line duly issued its bill of lading for the aforesaid two cases of dry goods, reciting the shipment thereof on board the steamship Alleghany and agreeing to transport and deliver the same to the consignee therein mentioned at Port au Prince.

28 Eleventh. On or about January 30, 1912, G. Amsinck & Co., at New York, shipped in good order and condition, on board the steamship Alleghany, bound from New York to Puerto M S N Columbia, 10 bales of cotton goods marked Neiva 711/20 respect- Barranquilla ively, consigned to Messrs. Alzamora Palacio & Company, at Puerto Columbia. Freight on the said shipment in the sum of $11.18 was prepaid at New York.

The Hamburg-American Line duly issued its bill of lading for the aforesaid bales of cotton goods, reciting the shipment thereof on board the steamship Alleghany, and agreeing to transport and deliver the same to the consignee therein named, at Puerto Columbia.

On or about January 19, 1912, at Glasgow, Scotland, Roberto Vargas shipped on board the steamship Caledonia, bound for New York, 8 bales of cotton goods, marked [F V & H] 1449/50, 649, Savanilla 588/592 respectively, consigned to Emil L. Boas, General Manager, Hamburg-American Line at New York, for transshipment to Puerto

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Columbia. Freight on the said shipment in the sum of $— was prepaid.

A through bill of lading was duly issued for the said eight bales of cotton goods by the agents of the Hamburg-American Line at Glasgow, and the merchandise therein mentioned was duly transshipped at New York on board the steamship Alleghany on or about January 31, 1912.

The aggregate value of the aforesaid eighteen bales of dry goods and cotton goods was £321, which, at the exchange rate of $4.8665, equals, in American currency, $1,562.15.

29 Twelfth. On or about February 1, 1912, at New York, the Autopiano Company, shipped in good order and condition on board the steamship Alleghany, bound from New York to Savanilla, four cases of pianos marked Aurelio Bermudez, Barranquilla, Columbia, 81,294, 81,832, 81,827 and 81,853 respectively consigned to V. Dugand e Hijo, at Savanilla. The aggregate value of the four cases above mentioned was $1,045.

The Hamburg-American Line duly issued its bill of lading for the aforesaid cases of merchandise, reciting the shipment thereof on board the steamship Alleghany and agreeing to transport and deliver the same to the consignee therein mentioned at Savanilla.

Thirteenth. On or about January 30, 1912, at New York, Lyon & Co. shipped in good order and condition on board the steamship Alleghany, bound for ports in Hayti, the following merchandise: 50 boxes herrings marked A M / L & C / Jeremie and 25 bags of flour marked A M / L & C, / Jeremie consigned to A. Magloire, at Jeremie; 2 drums of codfish, 6/2 drums codfish, 4/4 drums codfish, 40 bbls. of Alewives, 150 boxes of herrings, 6/2 barrels of pork and 5 barrels of pork heads, all marked D & CO / L & C, consigned to Delinois & Co., at Port au Prince; 60 boxes of P. au P. herrings, one case of butter and one case of oleo, all marked L P K / L & C, / Jeremie consigned to L. P. Kerlegand at Jeremie; 100 boxes of her-

30 rings, 137 pieces of boards, 135 pieces of boards and one bale of cottons marked (D G) / L & C, consigned to D. Guillou at Aux Cayes; 2 drums of codfish, 2/2 drums of codfish, 10/4 drums of codfish, 10 barrels of Alewives, 5 barrels of mackerel, 50 boxes herrings, 60 bags flour and 200 cases kerosene oil, marked Aux Cayes / Roux / L & C, / P. au P. consigned to Messrs. Roux & Co., Port au Prince; 4 bales cottons and 4 cases cottons, marked J J / L & C 303, 302, 6710/11, 1/4 respectively, consigned to Joseph Jabon, Miragoane; 2 bales of cottons marked Miragoane

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E D
L & C 6706/7 respectively, consigned to Elias Daumitte, Mira-
Miragoane
goane; 5 drums of codfish, 6/2 drums of codfish, 4/4 drums of cod-
F. Calisti
fish, and 15 barrels of alewives, marked L & C, consigned to F.
Aux Cayes
Calisti, Aux Cayes; 2 bales cottons and one case cottons marked
A G
L & C 6716, 323 and 33 respectively, consigned to Alfred Gogny,
P. au P.
Port au Prince; 30 cases lard, 1 bag nutmegs, 5 bags pepper and 1
A T L
case cottons, marked L & C, consigned to A. T. Lestage, Jeremie;
Jeremie
31 100 bags flour, 18 cases lard, 10/2 cases soap, 3 cases oleo, 10
Gousse
barrels sugar, and 5 barrels beer, marked L & C, consigned to T.
Miragoane
Gousse, Miragoane; 3 bales cotton, 50 bags flour, and 2 bales oakum,
L A R
marked L & C, consigned to L. A. Roumer, Jeremie. Freight on
Jeremie
the aforesaid merchandise, aggregating $760.87, was prepaid at New York. The aggregate value of the aforesaid merchandise, including the prepaid freight was $9,130.

The Hamburg-American Line duly issued its bills of lading for the aforesaid several packages of merchandise, reciting the shipment thereof on board the steamship Alleghany and agreeing to transport and deliver the same to the several consignees at the several ports of destination above set forth.

Fourteenth. On February 2, 1912, shortly after 11 o'clock A. M. while the Alleghany was bound on the voyage to the ports aforesaid, she came into collision with the steamship Pomaron at a point about 90 miles east of Cape Henry, the Alleghany sustaining such injuries that she afterwards sank, causing a total loss of all her cargo. The libellants have no means of knowing precisely the circumstances of the collision, but they are informed and allege that shortly prior to the collision the Alleghany was standing on a course of approximately south, and the Pomaron was standing on a course approximately east. The wind was high, the sea rough, and both vessels were proceeding at full speed through falling snow, without sounding signals as required by Article 16 of the International
32 Rules. The vessels were on crossing courses, and the Alleghany had the Pomaron on her own starboard hand. Nevertheless, after learning of the presence and approach of the Pomaron, the Alleghany starboarded her helm in an effort to cross the course of the Pomaron, and neglected to stop and reverse in due season. The Pomaron, after learning of the presence and approach of the Alleghany on her port hand, at first gave a single short blast of her whistle, without making a corresponding change of helm, and after-

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wards, when the vessels were closer together, improperly changed her course and speed so as to bring about a collision with the starboard side of the Alleghany at about a right angle. Neither vessel sounded reversing signals, or other appropriate signals to indicate their intended manœuvres when the risk of collision arose.

The loss of the cargo described in the libel was not caused nor contributed to by any fault on the part of the libellants, but was caused or contributed to by faults on the part of said steamers as follows:

a. On the part of the Pomaron:

1. In that a good lookout was not maintained.

2. In that the steamer was proceeding at an immoderate rate of speed in falling snow, without sounding the whistle signals required by law.

3. In that, after sighting or learning of the approach of the Alleghany on her own port hand, she sounded a single short blast on her whistle, without making a corresponding change of course, and subsequently, when the vessels were close together, she made a change of course and speed that caused her to swing into the
33 starboard side of the Alleghany, without indicating her manœuvres by appropriate whistle signals.

4. In that she failed to hold her course and speed.

5. In that, in consequence of thick weather or other cause, she found herself so close to the Alleghany that collision could not be avoided by the action of that vessel alone, yet failed to take such action as would have best aided to avert collision, by reversing her engines seasonably, and by swinging away from instead of toward the position of the Alleghany.

6. In other respects to be shown at the trial.

b. On the part of the Alleghany:

1. In that a good lookout was not maintained.

2. In that the steamer was proceeding at an immoderate rate of speed, in falling snow, without sounding the whistle signals required by law.

3. In that she failed to keep out of the way of the Pomaron after sighting the latter vessel.

4. In that, after sighting, or otherwise learning of the approach of the Pomaron on her own starboard hand, so as to involve risk of collision, she starboarded her helm in an effort to cross ahead of the other vessel, and failed to stop and reverse seasonably.

5. In that she failed to sound whistle signals, indicating her manœuvres immediately before the collision, in seasonable time, and altogether omitted the reversing signal.

6. In other respects to be shown at the trial.

Fifteenth. The shipment referred to in detail in the eighth article of this libel, aggregating in value the sum of $2,485, including the prepaid freight thereon, was fully insured by the owner
34 thereof under marine policies issued by the libellant, Nord-Deutsche Insurance Company, against marine perils during the said voyage of the Alleghany. Under said contracts of insurance the libellant, Nord-Deutsche Insurance Company, became liable for

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the loss sustained by the owner of the said cargo in consequence of the loss of the Alleghany, as aforesaid, and has paid, for the benefit of the said owner of the said cargo, the amount necessary to indemnify the said owner for its damages sustained by reason of the collision, namely, the amount of the value of the said cargo as set forth in article Eighth of this libel, amounting in the aggregate to $2,485, and has succeeded by right of subrogation and assignment to the rights of the owner of the said cargo to sue for and recover the same herein.

Sixteenth. The various shipments referred to in detail in the ninth article of this libel, aggregating in value the sum of $364.99, including the prepaid freight thereon, were fully insured by the owners thereof under marine policies issued by the libellant, Union Insurance Society of Canton, Limited, against marine perils during the said voyage of the Alleghany. Under said contracts of insurance, the libellant, Union Insurance Society of Canton, Limited, became liable for the losses sustained by the owners of the said cargo, in consequence of the loss of the Alleghany as aforesaid, and has paid, for the benefit of the respective owners of the said shipments, the amounts necessary to indemnify them for their damages, sustained by reason of the collision, namely, the amount of the values of the said several shipments as set forth in Article Ninth of this libel, amounting in the aggregate to $364.99, and has succeeded by right of subrogation and assignment to the rights of the owners of the said shipments respectively, to sue for and recover the same herein.

Seventeenth. The shipment referred to in detail in the Tenth Article of this libel, aggregating in value the sum of $230, including the prepaid freight thereon, was fully insured by the owner thereof under marine policies issued by the libellant, Commercial Union Assurance Company, Limited, against marine perils during the said voyage of the Alleghany. Under said contracts of insurance, the libellant, Commercial Union Assurance Company, Limited, became liable for the loss sustained by the owner of the said cargo, in consequence of the loss of the Alleghany, as aforesaid, and has paid, for the benefit of the owner of the said shipment, the amount necessary to indemnify it for its damage sustained by reason of the collision, namely, the amount of the value of the said shipment as set forth in the Tenth Article of this libel, amounting in the aggregate to $230, and has succeeded by right of subrogation and assignment to the rights of the owner of the said shipment to sue for and recover the same herein.

Eighteenth. The shipments referred to in detail in the Eleventh Article of this libel, aggregating in value the sum of $1,562.15, including the prepaid freight thereon, were fully insured by the owners thereof under marine policies issued by underwriters at Lloyds, London, against marine perils during the said voyage of the Alleghany. Under said contracts of insurance the said underwriters became liable for the losses sustained by the owners of the said cargo in consequence of the loss of the Alleghany, and have paid, for the benefit of the said owners of said cargo, the amount necessary

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to indemnify the said owners for their damages sustained by reason of the collision, namely, the amount of the value of the said cargo as set forth in Article Eleventh of this libel, amounting in the aggregate to $1,562.15, and in consideration of such payments said shippers duly assigned all their rights and interest in the said goods to the Executive Committee of the Corporation of Lloyds.

Nineteenth. The various shipments referred to in detail in Articles Twelfth and Thirteenth of this libel, aggregating in value the sum of $10,175, including the prepaid freight thereon, were fully insured by the owners thereof under marine policies issued by the libellant, Ætna Insurance Company, against marine perils during the said voyage of the Alleghany. Under said contracts of insurance, the libellant, Ætna Insurance Company, became liable for the losses sustained by the owners of the said cargo in consequence of the loss of the Alleghany as aforesaid, and has paid, for the benefit of the respective owners of the said shipments, the amounts necessary to indemnify them for their damages sustained by reason of the collision, namely, the amounts of the values of the said several shipments as set forth in Articles Twelfth and Thirteenth of this libel, amounting in the aggregate to $10,175, and has succeeded by right of subrogation and assignment to the rights of the owners of the said shipments respectively to sue for and recover the same.

Twentieth. The respondent, Furness, Withy & Company,
37 Limited, is a foreign corporation, and, as libellants are informed and believe, none of its officers or directors resides or is within this district. Said respondent, however, has certain property within the district, the British steamship Richmond, her engines, boilers, tackle, apparel and furniture, of which the respondent, Furness, Withy & Company, Limited, is sole owner.

Twenty-first. All and singular the premises of this libel are true and within the Admiralty and Maritime jurisdiction of this Honorable Court.

Wherefore, the libellants pray that process in due form may issue, with clause of foreign attachment, against the respondent, Furness, Withy & Company, Limited, and further commanding the Marshal of this district, in case the said respondent cannot be found within the district, to attach its said steamship Richmond, her engines, boilers, tackle, apparel and furniture, and that a decree may be entered in favor of the libellant, Nord Deutsche Insurance Company, in the sum of $2,485, in favor of the libellant, Union Insurance Society of Canton, Limited, in the sum of $364.99, in favor of the libellant, Commercial Union Assurance Company, Limited, in the sum of $230, in favor of the libellant, The Corporation of Lloyds, in the sum of $1,562.15, and in favor of the libellant, Ætna Insurance Company, in the sum of $10,175, making in all the sum of $14,817.14, with interest thereon and the costs of this action, or that the Court will grant to the libellants such other or further relief as the justice of the cause may require.

CONVERS & KIRLIN,
Proctors for Libellants.

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38 SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

John C. Eustace, being duly sworn, says: That he is Vice-President of the Corporation of Willcox, Peck & Hughes, and that the said corporation is the agent in New York of the libellants, Nord Deutsche Insurance Company and Union Insurance Society of Canton, Limited; that the foregoing libel is true of his own knowledge, except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

The sources of his information and the grounds of his belief as to the matters not within his own knowledge are reports and claims made to and upon the libellants by the shippers, consignees and owners of the cargo hereinbefore mentioned, or by their representatives.

The reason that this verification is not made by the libellants is that they are foreign corporations, and the reason that it is not made by any officer of the said corporation is that none of them is at present within the United States.

JOHN C. EUSTACE.

Sworn to before me this 1st day of July, 1912.

[SEAL.] GEO. A. WASHINGTON,
Notary Public, New York County.

[Endorsed:] Libel, filed: July 2, 1912.

39 At a Stated Term of the United States District Court for the Southern District of New York, held at the Court Rooms thereof, in the Post Office Building, in the Borough of Manhattan, City of New York, on the 9th day of August, 1912.

Present: Hon. George C. Holt, U. S. District Judge.

NORD-DEUTSCHE INSURANCE COMPANY, UNION INSURANCE SOCIETY of Canton, Limited, Commercial Union Assurance Company, Limited, The Corporation of Lloyds, and Ætna Insurance Company, Libellants,

against

FURNESS, WITHY & COMPANY, LIMITED, and HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT, Respondents.

Order Amending Libel.

On the underwritten consent and on motion of Convers & Kirlin, proctors for all the libellants in the above-entitled action, it is hereby

Ordered, that the libel heretofore filed herein be and it hereby is amended in the following particulars:

First. In Article Eighth of the libel add to the end of that article the following paragraph:

40 "2. On or about February 1, 1912, at New York, Morris & Company shipped in good order and condition on board the

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steamship Alleghany, bound from New York to Port au Prince, the following 39 packages of merchandise: 5 tierces compound; 1 case compound; 5 tierces lard; 20 bbls. pork and 8 bbls. beef, O., L. & Co.
marked EN consigned to Oloffson, Lucas & Co., at Port
Port au Prince
au Prince.

"On or about February 1, 1912, at New York, Morris & Company also shipped in good order and condition on board the steamship Alleghany, the following 35 packages of merchandise: 10 bbls. pork; 10 half bbls. pork; 5 bbls. beef, and 10 half bbls. beef, GB
marked Ol & Co. consigned to order of Morris & Com-
Port au Prince
pany, at Port au Prince.

"Freight on the said shipments in the sums of $61.99 and $35.72, respectively, was paid at New York. The aggregate value of the 74 packages of merchandise aforesaid, including the prepaid freight thereon, was $1,435.00.

"The Hamburg-American Line duly issued its bills of lading for the said 74 packages of merchandise aforesaid, reciting the shipment thereof on board the steamship Alleghany, and agreeing to transport and deliver the same unto the consignees mentioned in the said bills of lading at Port au Prince."

Second. In Article Fifteenth of the libel change the amount $1,050 to read $2,485, wherever the said amount appears in that article.

41 Third. In the Wherefore clause change the amount $1,050 so as to read $2,485, and change the total amount $13,382.14 so as to read $14,817.14.

GEO. C. HOLT,
U. S. District Judge.

We consent to the entry of the foregoing order.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Furness, Withy & Company, Ltd.

[Endorsed:] Order amending libel, entered: August 13, 1912.

42 To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The answer of Furness, Withy & Company, Limited, to the libel of Nord-Deutscher Insurance Company, Union Insurance Society of Canton, Limited, Commercial Union Assurance Company, Limited, The Corporation of Lloyds, and the Ætna Insurance Company, in a cause of collision, civil and maritime, alleges as follows:

First. The respondent admits the first, second, third, fourth, fifth, sixth and seventh articles of the libel.

Second. The respondent denies any knowledge or information

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sufficient to form a belief as to the allegations of the eighth, ninth, tenth, eleventh, twelfth and thirteenth articles of the libel.

Third. The respondent admits that on February 2, 1912, shortly after 11 o'clock A. M. the Alleghany and the Pomaron were in collision at a point about 100 miles east of Cape Henry; that the Alleghany afterwards sank; that shortly prior to the collision the Alleghany was on a course approximately south and the Pomaron was on a course approximately east; that the vessels were on crossing courses and the Alleghany had the Pomaron on her own starboard hand; that the Pomaron gave a single short blast signal. The respondent denies that the vessels were proceeding through falling snow and further denies each and every allegation of fault on the part of the Pomaron contained in the fourteenth article of the libel.

Fourth. The respondent denies any knowledge or information sufficient to form a belief as to the fifteenth, sixteenth, seventeenth, eighteenth, and nineteenth articles of the libel.

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Fifth. The respondent admits the twentieth article of the libel.

Sixth. The respondent admits jurisdiction and denies the other allegation of the twenty-first article of the libel.

Seventh. Further answering, the respondent alleges as follows: The respondent is a corporation created by and existing under the laws of the United Kingdom of Great Britain and Ireland, and is the owner of the British steamship Pomaron, which is a steel screw steamship of 1,809 tons gross, 1,127 tons net, 278 feet long, 40.5 feet beam and 20.5 feet in depth of hold. Until the collision the Pomaron was tight, staunch, strong and in all respects seaworthy.

On February 1, 1912, the Pomaron left Baltimore bound for Leith, laden with grain and general cargo. She passed Cape Henry between midnight and 1 A. M. on the 2nd, and set a course E. by N. ¼ N. magnetic, her compass course being E. by N., which course she maintained until just before the collision. The weather was fine and clear and the wind a moderate breeze from the west. The ship was making about nine knots an hour.

About 10:35 A. M. the first officer of the Pomaron who was in charge of her navigation, sighted on the port bow a steamship, distant about ten miles, which was apparently steering a course about south. The bearing of this vessel, which proved to be the Alleghany, did not change as she approached, but the Pomaron kept her course and speed until she saw that the Alleghany was doing nothing whatever to keep out of the way of the Pomaron. The first officer of the Pomaron, therefore blew one blast of his whistle and at the same time ordered the helm a little to port. Shortly afterwards the Alleghany suddenly blew a signal of two blasts, indicating that she was directing her course to port with the intention of crossing the Pomaron's bows. Seeing that a collision was inevitable, the first officer of the Pomaron ordered the engines full speed astern and the helm put hard a-port in an effort to ease the blow. The Alleghany kept on at full speed across the Pomaron's bows, at the last moment swinging apparently under

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a starboard helm, and the vessels came together, the Pomaron's stem striking the Alleghany a glancing blow on her starboard side abaft the engine room. The way of the Pomaron was almost checked at the time of the collision, but the Alleghany was swinging rapidly to port and went on at full speed for some distance. The Pomaron stood by to render assistance and took all the crew and passengers on board when it was found that the Alleghany was sinking.

Ninth. By reason of the collision the Pomaron was seriously damaged, her bow and stem being twisted to starboard, her port anchor lost and many of her plates and frames broken.

Tenth. The collision was not caused or contributed to by any negligence on the part of the Pomaron or of those in charge of her, but was due solely to the negligence of the Alleghany in the following respects among others:

45 1. In that a good lookout was not maintained.

2. In that there was no officer or any competent person in charge of her navigation for some time prior to the collision.

3. In that although she had the Pomaron on her starboard hand she did not keep out of the way of the Pomaron.

4. In that she made no change of course until too late to avoid a collision.

5. In that she starboarded her helm, and attempted to cross the Pomaron's bows.

6. In that she did not port her helm or stop and reverse in time to avoid a collision.

7. In that she did nothing to avoid a collision. All and singular the premises are true.

Wherefore, the respondent prays that the libel herein may be dismissed, with costs.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Respondent.

SOUTHERN DISTRICT OF NEW YORK.
County of New York, ss:

Charles C. Burlingham, being duly sworn, says: I am a member of the firm of Burlingham, Montgomery & Beecher, proctors for the respondent herein. I have read the foregoing answer and the same is true to the best of my knowledge, information and belief. The sources of my knowledge and information are statements by the master, officers and crew of the Pomaron. The reason why I make this verification is that the respondent is a foreign

46 corporation none of whose officers is within the City of New York.

CHARLES C. BURLINGHAM.

Sworn to before me this 8th day of October, 1912.

[SEAL.] CHAUNCEY I. CLARK,
Notary Public, Kings County.

Certificate filed in New York County.

[Endorsed:] Answer filed October 9, 1912.

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47 To the Honorable the Judges of the United States District Court for the Southern District of New York:

The libel and complaint of Walter D. Despard, as Assignee of the owners of certain cargo on board the steamer Alleghany, against Furness, Withy & Company, Limited, in a cause of collision, civil and maritime, respectfully shows and alleges:

First. Libellant is a resident of New York City, and is the assignee of the owners of certain cargo on board the steamer Alleghany on the occasion of a collision on February 2nd, 1912, between said steamer and the British steamer Pomaron, off the coast of Virginia—as a result of which said steamer Alleghany was sunk and, with her cargo, including that owned by the assignors of libellant, became a total loss.

Second. At all the times hereinafter mentioned, the respondent, Furness, Withy & Company, Limited, was and is a foreign corporation, organized under the laws of the Kingdom of Great Britain and Ireland, and was and now is the sole owner of the British steamer Pomaron. Said respondent has property, credits and effects within this District.

Third. On or about the first day of February, 1912, the German steamer Alleghany, with a general cargo on board, including a large quantity of cargo owned by the assignors of libellant—the details of which are set out in "Schedule A" hereto annexed and made a part hereof—left the port of New York, bound for various ports in the West Indies. While proceeding on her voyage, and at about 11 A. M. on the morning of February 2nd, 1912, the
48 Alleghany was run into by the British steamer Pomaron at a point about 90 miles east of Cape Henry, Virginia, as a result of which the Alleghany was sunk, and with her cargo, including that owned by libellant's assignors, became a total loss. Libellant alleges, upon information and belief, that prior to the collision the Alleghany was proceeding on a course of South 4° West, magnetic, and the Pomaron—which had left Hampton Roads bound for European ports—was standing on a course of East by North ¼ North, magnetic. The weather was clear, and both vessels were proceeding at full speed, the Alleghany making about 12 or 13 knots per hour, the Pomaron about 9 knots per hour. When the Alleghany and the Pomaron were first called upon to navigate with reference to each other, they were on crossing courses—the Alleghany having the Pomaron on her own starboard hand. At this time the navigating officer of the Alleghany was in the chart room, working up his position from observations taken shortly before. There was no officer on the bridge, and no sufficient lookout was being maintained. On the other hand, the chief officer of the Pomaron was in charge of the navigation of his vessel, and first made out the Alleghany several miles away at a bearing given in the log book of the Pomaron as Northeast. The Alleghany and the Pomaron continued to approach each other until they were about a mile apart, at which time the officer in charge of the Pomaron observed that the Alleghany was continuing on her southerly course, proceeding at a speed of between twelve and thirteen knots per hour, with no one on

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her bridge. In that situation the Pomaron blew a signal of one whistle and ported her helm, and although the said whistle remained unanswered, and although it was apparent that the
49 Alleghany was keeping her course and speed, the Pomaron continued on at her full speed of about nine knots and under her port helm, until the distance between the steamers was reduced from one mile to a half mile. At this point the Alleghany blew a signal of two whistles, indicating that her helm was being starboarded and that she would continue ahead and across the bows of the Pomaron. Thereupon the engines of the Pomaron were reversed at full speed and her helm put hard-a-port and kept hard-a-port until the stem of the Pomaron came into collision with the starboard side of the Alleghany at a point abaft the engine room, doing such damage to the Alleghany that she shortly afterward filled and sank, and, with her cargo, became a total loss.

Fourth. Said collision and consequent damage were not caused or contributed to by any default or negligence on the part of your libellant, but were caused by the negligence and fault of both the steamers Alleghany and Pomaron more especially in the following particulars, among others which will be pointed out upon the trial of this action, to wit:

On the part of the steamer Alleghany:

1. In that a good lookout was not maintained.

2. In that she failed to give timely signals of her intention to continue across the bows of the Pomaron.

3. In that she failed to take proper measures to avoid collision after she saw or should have seen that the Pomaron was continuing her course to starboard in violation of the starboard-hand rule.

50 On the part of the steamer Pomaron.

1. In that a good lookout was not maintained.

2. In that she failed to keep her course as well as her speed as required by the starboard-hand rule.

3. In that, while she and the Alleghany were approaching each other on crossing courses, and when they were a mile apart, she negligently blew a signal of one whistle and ported her helm in a reckless attempt to cross the bows of the Alleghany.

4. In thereafter continuing at full speed under a port helm until the distance between the vessels was decreased from one mile to a half mile while her one whistle signal remained unanswered, and while it was obvious that the Alleghany was continuing ahead without change of course or speed, with no one on her navigating bridge.

5. In failing seasonably to stop and reverse in order to avoid a collision.

6. In putting her helm to port instead of to starboard after the Alleghany blew her signal of two whistles when the vessels were half a mile apart.

Fifth. By reason of the premises libellant, as assignee of the owners of the cargo set out in "Schedule A," has sustained damage amounting in the aggregate to the sum of Fifteen thousand eight hundred forty-six and 13/100 ($15,846.13) dollars, no part of which has been paid, although duly demanded.

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Sixth. The respondent, Furness, Withy & Company,
51 Limited, is a foreign corporation and, as libellant is informed and believes, none of its officers or directors reside in this District. Said respondent, however, has certain property within this District, including the British steamer Richmond, her engines, boilers, tackle, apparel and furniture, of which the respondent, Furness, Withy & Company, Limited, is sole owner.

Seventh. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellant prays that process may issue with clause of foreign attachment against the respondent, Furness, Withy & Company, Limited, citing it to appear and answer in the premises, and further commanding the Marshal of this District in case the said respondent cannot be found within the District, to attach its said steamship Richmond, her engines, boilers, tackle, apparel and furniture, and that a decree may be entered against the respondent in favor of the libellant for the amount of his damages aforesaid, with interest thereon, together with the costs and disbursements of this action, and that the Court may grant such further and other relief as the justice of the cause may require.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellant,
64 *Wall Street, New York City.*

52 STATE OF NEW YORK,
County of New York, ss:

Walter D. Despard, being duly sworn, deposes and says: That he is the libellant herein; that he has read the foregoing libel and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

WALTER D. DESPARD.

Sworn to before me this 11th day of October, 1912
[SEAL.] RUSSELL H. PORTER,
Notary Public, New York County.

SCHEDULE A.

H. Becker & Co., 1289 pkgs. Merchandise	$10,883.00
Holsten-Brauerei, 40 cases Beer	292.80
Langstaff, Ehrenburg & Pollak, 2 cases Yarn	578.40
Nottebohm & Co., 2 bales Jute Bags	225.60
Richard Korn, 2 cases Grave-stones	24.00
Hermann Strack, 500 bags Rice	2,376.00
Robert E. Stecher, 4 cases Papers, 1 case packthread	116.64
Walty & Co., 3 bales Cotton Goods	1,033.51
G. Vogtmann & Co., 10 casks Colors, 14 bdls. Shovels	316.18
Total	$15,846.13

[Endorsed:] Libel, filed October 11, 1912.

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53 To the Honorable the Judges of the United States District Court for the Southern District of New York:

The answer of Furness, Withy & Company, Limited, to the libel and complaint of Walter D. Despard, in a cause of collision, civil and maritime, alleges as follows:

First. The respondent admits that a collision occurred on February 2, 1912, between the steamships Alleghany and Pomaron off the coast of Virginia, as a result of which the Alleghany was sunk and with her cargo became a total loss. Further answering the respondent denies any knowledge or information sufficient to form a belief as to the other allegations of the first article of the libel.

Second. The respondent admits the second article of the libel.

Third. The respondent denies any knowledge or information as to the nature, quantity or value of cargo on board the Alleghany, but admits that said steamship left New York on February 1, 1912, bound for various ports in the West Indies; and that on February 2, 1912, at a point about 90 miles east of Cape Henry, the Alleghany was sunk in collision with the British steamship Pomaron. Further answering, the respondent denies that the facts and circumstances of the collision are accurately set forth in the third article of the libel, and alleges that the true facts as to said collision are set forth in the eighth article of the answer.

Fourth. The respondent denies that said collision and consequent damage were caused or contributed to by any negligence or fault on the part of the steamship Pomaron and further
54 denies each and every charge of fault on the part of the Pomaron alleged in the fourth article of the libel.

Fifth. The respondent admits demand and non-payment, and it denies any knowledge or information sufficient to form a belief as to the other allegations of the fifth article of the libel.

Sixth. The respondent admits the sixth article of the libel.

Seventh. The respondent admits the jurisdiction and denies the other allegation of the seventh article of the libel.

Eighth. Further answering, the respondent alleges as follows:

On February 1, 1912, the Pomaron, which is a steel screw steamship of 1809 tons gross, 1127 tons net, 278 feet long, 40.5 feet beam and 20.5 feet in depth of hold, left Baltimore bound for Leith, laden with grain and general cargo. She passed Cape Henry between midnight and 1 A. M. on the 2nd, and set a course E. by N. ¼ N. magnetic, her compass course being E. by N., which course she maintained until just before the collision. The weather was fine and clear and the wind a moderate breeze from the west. The ship was making about nine knots an hour.

About 10:35 A. M., the first officer of the Pomaron, who was in charge of her navigation, sighted on the port bow a steamship, distant about ten miles, which was apparently steering a course about south. The bearing of this vessel, which proved to be the Alleghany, did not change as she approached, but the Pomaron kept her course and speed until she saw that the Alleghany
55 was doing nothing whatever to keep out of the way of the Pomaron. The first officer of the Pomaron, therefore blew

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one blast of his whistle and at the same time ordered the helm a little to port. Shortly afterwards the Alleghany suddenly blew a signal of two blasts, indicating that she was directing her course to port with the intention of crossing the Pomaron's bows. Seeing that a collision was inevitable, the first officer of the Pomaron ordered the engines full speed astern and the helm put hard-a-port in an effort to ease the blow. The Alleghany kept on at full speed across the Pomaron's bows, at the last moment swinging apparently under a starboard helm, and the vessels came together, the Pomaron's stem striking the Alleghany a glancing blow on her starboard side abaft the engine room. The way of the Pomaron was almost checked at the time of the collision, but the Alleghany was swinging rapidly to port and went on at full speed for some distance. The Pomaron stood by to render assistance and took all the crew and passengers on board when it was found that the Alleghany was sinking.

Ninth. By reason of the collision the Pomaron was seriously damaged, her bow and stem being twisted to starboard, her port anchor lost and many of her plates and frames broken.

Tenth. The collision was not caused or contributed to by any negligence on the part of the Pomaron or of those in charge of her, but was due solely to the negligence of the Alleghany in the following respects among others:

1. In that a good lookout was not maintained.

2. In that there was no officer or any competent person
56 in charge of her navigation for some time prior to the collision.

3. In that although she had the Pomaron on her starboard hand she did not keep out of the way of the Pomaron.

4. In that she made no change of course until too late to avoid a collision.

5. In that she starboarded her helm, and attempted to cross the Pomaron's bows.

6. In that she did not port her helm or stop and reverse in time to avoid a collision.

7. In that she did nothing to avoid a collision.

All and singular the premises are true.

Wherefore the respondent prays that the libel herein may be dismissed, with costs.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Respondent.

SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

Charles C. Burlingham, being duly sworn, says: I am a member of the firm of Burlingham, Montgomery & Beecher, proctors for the respondent herein. I have read the foregoing answer and the same is true to the best of my knowledge, information and belief. The sources of my knowledge and information are statements by the master, officers and crew of the Pomaron. The reason why

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I make this verification is that the respondent is a foreign
57 corporation none of whose officers is within the City of New York.

CHARLES C. BURLINGHAM.

Sworn to before me this 19th day of November, 1912.
[SEAL.] ROBINSON LEECH,
Notary Public, Kings County.

Certificate filed in New York County.

[Endorsed:] Answer filed November 19, 1912.

58 The following libels to recover damages for loss of cargo filed by Messrs. Harrington, Bigham & Englar, on behalf of:

Eugene J. F. Coleman for	$5,768
Marshall K. Weidensaul for	1,071.65
Francis W. Van Praag for	1,048.00
Orson G. Orr for	31,125.30
Laura Moore for	12,330.00
Louis Bertschman for	29,293.65

and the answers thereto filed by Burlingham, Montgomery & Beecher are omitted from the printing of the transcript of record, see stipulation as to record on appeal at page 284 of this record.

59 In the District Court of the United States for the Southern District of New York.

To the Honorable the Judges of the said Court:

The libel and complaint of the Boston Insurance Company, a corporation, against Furness, Withy & Company, Limited, a corporation, in cause of collision, civil and maritime, alleges as follows:

First. The Boston Insurance Company, the libellant, is a corporation, duly organized and existing under the laws of the State of Massachusetts. Furness, Withy & Company, Limited, the respondent, is a corporation, organized and existing under the laws of the Kingdom of Great Britain and Ireland, and at the time of the collision, hereinafter mentioned, was the owner of the British steamship Pomaron.

Second. On or about February 1st, 1912, the steamship Alleghany sailed from the Port of New York, bound on a voyage to various West Indian and South American ports.

Third. Heilbron, Wolff & Company, of New York, shipped on board said steamship Alleghany at New York, certain goods and merchandise of a value of Nine thousand seventeen and 39/100 ($9,017.39) dollars, to be carried by said steamship Alleghany on said voyage and to be delivered at the various ports in the West Indies and South America.

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60 Fourth. On or about February 2, 1912, the said steamship Alleghany, when in a position about one hundred miles east of Cape Henry, was run into and sunk by the said steamship Pomaron. As a result of the said collision, the said Alleghany, together with all the cargo on board, including the said goods and merchandise shipped by Heilbron, Wolff & Company, became a total loss.

Fifth. The Boston Insurance Company, the libellant herein, duly issued its policy of insurance to Heilbron, Wolff & Company, insuring them against loss upon said goods and merchandise during said voyage, and the said Boston Insurance Company has paid to the said Heilbron, Wolff & Company the sum of Nine thousand seventeen and 39/100 ($9,017.39) dollars on account of the loss of the said goods and merchandise, as a loss under said policy of insurance.

Sixth. Upon information and belief, the said collision between the steamships Pomaron and Alleghany occurred in the following manner:

Prior to the collision the Alleghany was on a course south four degrees west magnetic. The course of the Pomaron was east by north one-quarter north magnetic. The weather was clear. Both vessels were proceeding at full speed, the Alleghany making twelve or thirteen knots an hour and the Pomaron about nine knots an hour. The first officer of the Pomaron was in charge of her navigation and saw the Alleghany when the vessels were ten or twelve miles apart. The Alleghany was then bearing about northeast from the Pomaron. Both vessels continued on the courses above mentioned, at full speed. Later, the first officer of the
61 Pomaron used his glasses and saw no person on the bridge of the Alleghany and in charge of her navigation. The said first officer, however, made no change in the course or speed of the Pomaron until the two vessels were about a mile apart, when, still seeing no one on the bridge of the Alleghany and in charge of her navigation, he gave a signal of one whistle, and without waiting for any reply to that signal from the Alleghany, ported his helm. This signal was not answered by the Alleghany and the Alleghany continued on her course, without any change, at full speed. Although the signal of the Pomaron was not answered and no change was made in the course or speed of the Alleghany and no one could be seen on her bridge, in charge of her navigation, the Pomaron continued at full speed ahead under a port helm until the vessels were about half a mile apart, when the Alleghany gave a signal of two blasts, indicating that her helm was being put to starboard. The Pomaron made no reply to this signal from the Alleghany, but some time after it was given the engines of the Pomaron were put to full speed astern and her wheel was put hard to port. The vessels continued to approach each other and came into collision, the Pomaron striking the Alleghany on the starboard side of the latter, abaft of her engine room. The Alleghany sank a short time afterwards, and tog-ther with all her cargo, including the goods and merchandise shipped by the said Heilbron, Wolff & Company, became a total loss.

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Seventh. Said collision resulted from the negligence of those in charge of the navigation of the Pomaron in the following particulars:

1. In failing to maintain an efficient lookout.

2. In failing to keep her course and speed.

62 3. In blowing one whistle and attempting to cross the bows of the Alleghany, when the first officer in charge of the navigation of the Pomaron saw that no officer of the Alleghany was on her bridge and in charge of her navigation.

4. In porting her helm after giving a signal of one whistle without waiting for an answering signal from the Alleghany, with the knowledge on the part of her first officer that no officer of the Alleghany was on her bridge, in charge of her navigation, and with the knowledge that the Alleghany was holding her course, at full speed.

5. In continuing at full speed after failing to receive any answering signal from the Alleghany, with the knowledge on the part of her first officer that the Alleghany had no officer on her bridge, in charge of her navigation, and with the knowledge that the Alleghany was holding her course and speed.

6. In failing to stop and reverse at a proper time.

7. In putting her helm to port and not to starboard, after the Alleghany gave a signal of two blasts.

8. In failing to take such precautions as were required by the ordinary practice of seamen or by the special circumstances of the case.

9. In such other particulars as will be pointed out upon the trial of this cause.

Eighth. Furness, Withy & Company, Limited, is engaged in business in the City of New York, having an office at No. 1, Broadway.

Ninth. The libellant claims to recover herein from the re-

63 spondent the said sum of Nine thousand seventeen and 39/100 ($9,017.39) dollars, with interest thereon from February 2d, 1912.

Tenth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore: The libellant prays that process in due form of law, according to the course and practice of this Honorable Court in admiralty and maritime causes, may issue against the said Furnes, Withy & Company, Limited, and that it be compelled to answer, on oath, all and singular the matters aforesaid, and this Honorable Court will be pleased to decree payment of the damages aforesaid, with interest and costs, and that the libellant may have such other and further relief as it is justly entitled to receive.

WILLIAMS & STEVENSON,
Proctors for Libellant.

Office & P. O. Address, #27 Cedar Street, Borough of Manhattan, New York City.

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SOUTHERN DISTRICT OF NEW YORK, *ss:*

Ward Williams, being duly sworn, deposes and says that he is the Vice-President of the Boston Insurance Company, the libellant herein; that he has read the foregoing libel and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

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The sources of deponent's information are the bills of lading issued to Heilbron, Wolff & Company by the said steamship Alleghany, invoices of the said Heilbron, Wolff & Company and information obtained as to statements made by the officers of the said steamships Alleghany and Pomaron as to the facts relating to said collision.

WARD WILLIAMS.

Sworn to and subscribed before me this 28th day of October, A. D. 1912.

[SEAL.] BALTHASAR J. CARUSO,
Notary Public, Kings Co.

Certificate filed in New York Co.

[Endorsed:] Libel filed October 30, 1912.

65 To the Honorable The Judges of the District Court of the United States for the Southern District of New York:

The answer of Furness, Withy & Company, Limited, to the libel of the Boston Insurance Company in a cause of collision, civil and maritime, alleges as follows:

First. The respondent admits the first and second articles of the libel.

Second. The respondent denies any knowledge or information as to the allegations of the third article of the libel.

Third. The respondent admits that on February 2, 1912, the Alleghany was sunk in collision with the Pomaron when about one hundred miles east of Cape Henry and became a total loss. Further answering, the respondent denies any knowledge or information as to the other allegations of the fourth article of the libel.

Fourth. The respondent denies any knowledge or information sufficient to form a belief as to the allegations of the fifth article of the libel.

Fifth. The respondent denies that the facts and circumstances of the collision are accurately set forth in the sixth article of the libel and alleges that the true facts as to said collision are set forth in the tenth article of this answer.

Sixth. The respondent denies each and every allegation of the seventh article of the libel.

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Seventh. The respondent admits the eighth article of the
66 libel.

Eighth. The respondent denies any knowledge or information as to the allegations of the ninth article of the libel.

Ninth. The respondent admits the jurisdiction and denies the other allegation of the tenth article of the libel.

Tenth. Further answering the respondent alleges as follows:

On February 1, 1912, the Pomaron, which is a steel screw steamship of 1,809 tons gross, 1,127 tons net, 278 feet long, 40.5 feet beam and 20.5 feet in depth of hold, left Baltimore bound for Leith laden with grain and general cargo. She passed Cape Henry between midnight and 1 A. M. on the 2nd, and set a course E by N ¼ N magnetic, her compass course being E by N, which course she maintained until just before the collision. The weather was fine and clear and the wind a moderate breeze from the west. The ship was making about nine knots an hour.

About 10.35 A. M. the first officer of the Pomaron, who was in charge of her navigation, sighted on the port bow a steamship, distant about ten miles, which was apparently steering a course about south. The bearing of this vessel, which proved to be the Alleghany, did not change as she approached but the Pomaron kept her course and speed until she saw that the Alleghany was doing nothing whatever to keep out of the way of the Pomaron. The first officer of the Pomaron, therefore, blew one blast of his whistle and at the same time ordered the helm a little to port. Shortly afterwards the Alleghany suddenly blew a signal of two
67 blasts indicating that she was directing her course to port with the intention of crossing the Pomaron's bows. Seeing that a collision was inevitable, the first officer of the Pomaron ordered the engines full speed astern and the helm put hard-a-port in an effort to ease the blow. The Alleghany kept on at full speed across the Pomaron's bows, at the last moment swinging apparently under a starboard helm, and the vessels came together, the Pomaron's stem striking the Alleghany a glancing blow on her starboard side abaft the engine room. The way of the Pomaron was almost checked at the time of the collision, but the Alleghany was swinging rapidly to port and went on at full speed for some distance. The Pomaron stood by to render assistance and took all the crew and passengers on board when it was found that the Alleghany was sinking.

Eleventh. By reason of the collision the Pomaron was seriously damaged, her bow and stem being twisted to starboard, her port anchor lost and many of her plates and frames broken.

Twelfth. The collision was not caused or contributed to by any negligence on the part of the Pomaron or of those in charge of her, but was due solely to the negligence of the Alleghany in the following respects among others:

1. In that a good lookout was not maintained.

2. In that there was no officer or any competent person in charge of her navigation for some time prior to the collision.

3. In that although she had the Pomaron on her starboard hand she did not keep out of the way of the Pomaron.

68 4. In that she made no change of course until too late to avoid a collision.

5. In that she starboarded her helm, and attempted to cross the Pomaron's bows.

6. In that she did not port her helm or stop and reverse in time to avoid a collision.

7. In that she did nothing to avoid a collision.

All and singular the premises are true.

Wherefore the respondent prays that the libel herein may be dismissed, with costs.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Respondents.

SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

Charles C. Burlingham, being duly sworn, says: I am a member of the firm of Burlingham, Montgomery & Beecher, proctors for the respondent herein. I have read the foregoing answer and the same is true to the best of my knowledge, information and belief. The sources of my knowledge and information are statements by the master, officers and crew of the Pomaron. The reason why I make this verification is that the respondent is a foreign corporation none of whose officers is within the City of New York.

CHARLES C. BURLINGHAM.

Sworn to before me this 19th day of November, 1912.

[SEAL.] ROBINSON LEECH,
Notary Public, Kings County.

Certificate filed in New York County.

[Endorsed:] Answer filed Nov. 20, 1912.

69 To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The Libel and Complaint of the

FEDERAL INSURANCE COMPANY, THE SEA INSURANCE COMPANY, LIMITED, and LONDON ASSURANCE CORPORATION,
against
FURNESS, WITHY & COMPANY, LIMITED.

In a Cause of Collision, Civil and Maritime, alleges as follows:

First. The libellant Federal Insurance Company is a corporation organized under the laws of the State of New Jersey; the libellant Sea Insurance Company, Limited, is a corporation organized under the laws of the Kingdom of Great Britain and Ireland, having its principal office in Liverpool, England; and the libellant London

Assurance Corporation is a corporation organized under the laws of the Kingdom of Great Britain and Ireland, having its principal office in London, England.

Each of the said libellants was at the times herein mentioned engaged in the business of marine insurance and had and now have offices and agents within this district.

Second. The respondent, Furness, Withy & Company, Limited, is a corporation organized under the laws of the Kingdom of Great Britain and Ireland, having its principal office in West Hartlepool, England, and at the times herein mentioned was and now is sole owner of the steamship Pomaron. Said respondent has an office, an agent and property within this district.

70 Third. On the 1st day of February, 1912, the steamship Alleghany with a general cargo and mail on board, sailed from the port of New York bound for Inagua, Haiti and other ports in the West Indies and South America, and while proceeding on said voyage and on the 2d day of February, 1912, between the hours of eleven o'clock A. M. and noon, collided with the steamship Pomaron at a point in the Atlantic Ocean about one hundred miles East by North from Cape Henry, and by said collision said steamship Alleghany sustained such injuries that she sank shortly afterwards and with her cargo and mail became a total loss.

Fourth. The cargo and mail on board said steamship Alleghany which was so lost included the following merchandise and property shipped by the firm of G. Amsinck & Co., of the City of New York, viz:

2 Bales Cotton Prints and 10 Kegs Sherry Wine, marked P L S & C Cartagena and consigned to Pineda Lopez & Co., at Cartagena, of the value of $231.25.

1 Case Barthel Lamps and 6 cases Welting marked E. H. Cartagena and consigned to Espriella Hnos, of the value of $447.35;

1 Case Machinery parts, 1 case Shoemaker's supplies, 2 cases nails, 2 cases zinc wire, and 1 case Shoe lasts marked E. Hnos, Cartagena and, by mail, 1 package shoemaker's knives and 2 packages shoe machinery, consigned to Espriella Hnos, at Barranquilla, all of the value of $257.49;

27 Barrels Tallow, marked A. O. A. Barranquilla and consigned to A. Obregon, A. at Barranquilla, of the value of $786.04;

71 5 Cases Axes, 10 cases Edge Tools, 20 Cases Linseed Oil, 10 Bags Pepper, 5 Bags Cloves, 40 Bales Cinnamon and 100 cases Corn-starch, marked Franzalez, Barranquilla, and consigned to Franco, Gonzalez & Co., at Barranquilla, of the value of $909.86;

3 Cases Electric Wire and 1 case tools marked and consigned to Compania de Energia Electrica, Barranquilla, of the value of $143.98;

4 Cases and 13 pieces Mining Machinery and 2 Coils Rope marked B & C, Carranquilla, and consigned to Alzamora, Palacio & Co. at Puerto Colombia, of the value of $813.12;

11 Bundles Iron Pipes, 2 Bags pipe fittings, 1 Case Brass Valves, 6 Bundles Rubber Hose, 2 Cases Paint, 1 Barrel Lampware, 12 Coils Rope, 2 Bundles Furniture, 10 Barrels Coal and Tar, 1 Case

Toy Pistols, 1 Case Paper Caps, and 1 Case Dime Banks, marked P. L. & C. Barranquilla and consigned to Pineda, Lopez & Co., Pto. Colombia of the value of $1,412.22; 5 cases Almond Oil, 4 cases Castor Oil, 10 cases Crackers, 20 Cases Lard, 1 case Nitric Acid, 3 cases Drugs and 1 case Olive Oil, marked D. R. & C. Barranquilla, and consigned to Empresa Hanseatica at Pto. Colombia, of the value of $621.61;

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1 case Spring Scales, 1 case Drainers, 8 cases Coffee Mills, 1 case phono. parts, 5 cases phono. discs, 1 case tools, and 1 case Lamp chimneys, marked F. C. & C. Cartagena, and consigned to Franco Covo & Co., Cartagena, of the value of $837.60;

1 case Machinery Parts, 4 cases Typewriters and 1 case Typewriter supplies, marked J V M, Cartagena, and consigned to J. V. Mogollon, Cartagena, of the value of $714.84;

72 201 Bundles Pine Boards marked Leguerica, Cartagena, and consigned to Leguerica Hnos, Cartagena, of the value of $465.54;

12 bundles Scales, 3 cases Tools, 2 cases Water Coolers, 2 cases Stoves, 1 bundle Coffee Mills, 10 barrels and 3 cases lampware, 1 bundle Corsets, 5 bundles Boiler pipes, 1 case Electrical Supplies and 2 cases Machinery parts, marked D. M. & C., Cartagena, and consigned to Diego, Martinez & Co., Cartagena, of the value of $846.22;

1 Bundle and 2 Cases Pills, 1 Case Bromo Quinine, 1 Case Ointment, 12 Cases Candies and 50 Cases Cornstarch marked B H Cartagena, and consigned to Bustamente Hnos, Cartagena of the value of $608.26;

28 Bales Raw Cotton marked B U, Cartagena and consigned to Banco Union, Cartagena, of the value of $1,461.91;

5 Barrels Potatoes, 2 Barrels Onions, 1 Barrel Lamp Chimneys, 10 Cases Codfish, 2 Bundles Crushed Wheat, 1 Bag and 2 Cases Oats, 10 Cases Soap and 2 Bundles Leaf Tobacco, marked R & C., Cartagena, and consigned to Ramos & Castillo, of the value of $158.16;

7 Cases Butts, 1 Case Screws, 10 Barrels Glassware, 2 Cases Axes, and 3 Bales Cotton Prints marked G V & H. Cartagena and consigned to Pineda, Lopez & Co., Cartagena, of the value of $565.31;

2 Cases Kidney Beans, 5 Cases Scales, 2 Cases Axles, 2 Cases Condensed Milk, 1 Bag Pepper, 20 Cases Canned Goods, 10 Crts. Crackers, 10 Barrels Lard, 10 Barrels Potatoes, 4 Cases Cornstarch, marked Posso, Cartagena, and consigned to Lucindo Posso, Cartagena, of the value of $518.53; and

73 6 Barrels of Petroleum, marked Acueducto de Calanar, Cartagena, and consigned to Pineda, Lopez & Co., Cartagena, of the value of $42.57; the total value of the aforesaid cargo shipped by G. Amsinck & Co., being $11,841.86.

Also the following merchandise shipped by the firm of J. A. Pauli & Co., of New York City, viz.:

10 cases Shears and 2 Cases Mousetraps, marked TBS Pto Colom-

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bia and consigned to Alzamora, Palacio & Co. Pto. Colombia, of the value of $532.30;

1 Barrel, 5 Crates and 1 Case Plumbers' Supplies and 3 Cases Filing Cabinets marked P (anchor) P. Pto. Colombia, consigned to Pacini & Puccini, Pto. Colombia, of the value of $148.74;

6 Cases Lubricating Oil, 1 Box Pump, 2 Bales Paper and 4 Bales Cinnamon, marked L. G. & C. Pto. Colombia, Facatativa, and consigned to Alzamora, Palacio & Co., Pto. Colombia, of the value of $238.67;

And 4 Bales Leather, 2 Bales Cotton Drills and 1 Case Sandpaper, marked A R Pto. Colombia, and consigned to Alzamora, Palacio & Co., Pto. Colombia, of the value of $1,339.93; the total value of the aforesaid merchandise shipped by J. A. Pauli & Co., being $2,259.64.

Also the following merchandise shipped by the firm of Yglesias, Lobo & Co., of the City of New York, viz.:

70 Boxes Corn Flour, 50 Tins Matches and 20 Cases Lanterns, marked Palmar Y. Barranquilla, and consigned to Palacio & M. Z. Aparicio, Barranquilla, of the value of $545.16.

74 Also the following merchandise shipped by Singer Sewing Machine Co., viz.: 17 Packages Sewing Machines, marked G. L. Port au Prince and consigned to Georges Leon, Port au Prince, of the value of $273.97.

Also the following merchandise shipped by A. Fauconnet, viz.: 4 Cases Macaroni, marked L V ¼, consigned to A. de Matteis, Port au Prince, of the value of $35.

Also the following merchandise shipped by C. H. Pattengill, namely: 1 Case Meat Safe and 1 Case Metal and Glassware, marked and consigned to Fernand C. Laraque, Jeremie, Haiti, of the value of $80.24.

Fourth: That insurance was effected upon all of the merchandise mentioned in the preceding (third) article hereof, by or on behalf of the respective owners thereof, and for the full values thereof, with the libellant Federal Insurance Company, against loss or damage by perils of the seas and collision, covering same from port of shipment to the respective ports of destination thereof, and that prior to the filing of this libel the libellant Federal Insurance Company paid to or for the benefit of the respective owners of said merchandise the insured values thereof, the sums so paid by it exceeding in each instance the values stated in the preceding article, which amount in the aggregate to $15,035.87 and that thereupon the libellant Federal Insurance Company succeeded by right of subrogation and by assignment to the rights and causes of action of the several owners of said merchandise for the loss thereof, and is now entitled to sue for and recover the same.

75 Fifth. That the cargo and mail on board said steamship Alleghany which was so lost, included 1 case liquor and color, 1 case raisins and 1 case soap shipped by Geo. Lueders & Company,

to Alzamora, Palacio & Co., at Pto. Colombia, of the value of $201.99. of New York City, marked G L & C, Barranquilla, and consigned

Also two packages of Merchandise sent by the firm of Isaac Brandon & Brother, of New York City, by Registered mail addressed to Espriella Hermanos at Cartagena, of the value of $8.30.

Also 100 Bundles Steel Bars, 20 Pieces Steel Plates, 800 Bundles Galvanized corrugated Sheets, 12 Pieces Galvanized Steel Channels, and 360 Cases Wire Nails, marked L. W. & Co. Puerto Colombia, shipped by United States Steel Products Company and consigned to Lindemeyer, Wiese & Co., Empresa Hanseation at Puerto Colombia, of the value of $5,310.13.

Sixth. That insurance was effected upon all of the merchandise mentioned in the preceding (Fifth) article hereof, by or on behalf of the respective owners thereof, and for the full values thereof, with the libellant Sea Insurance Company, Ltd., against loss or damage by perils of the seas and collision covering same from port of shipment to the respective ports of destination thereof, and that prior to the filing of this libel the libellant Sea Insurance Company paid to or for the benefit of the respective owners of said merchandise the insured values thereof, the sums so paid by it exceeding in each instance the values stated in the preceding article, which amount in the aggregate to $5,520.42, and that thereupon the libellant Sea Insurance Company, Ltd., succeeded by right of subrogation
76 and by assignment to the rights and causes of action of the several owners of said merchandise for the loss thereof and is entitled to sue for and recover the same.

Seventh. That the cargo on board the S. S. Alleghany which was so lost, included the following merchandise shipped by the firm of O. C. Kanzow & Co., of the City of New York, viz.:

F M

20 Bags and 10 Barrels Flour, marked K Port au Prince, and consigned to F. Mollentheil, Port au Prince, of the value of $186.74;

D D B

and 40 packages of various merchandise marked K Petit Goave, and consigned to Dammond D. Brignolle, at Petit Goave, of the value of $554.56, the total value of said cargo shipped by O. C. Kanzow & Co., being $741.30.

Also 1 Barrel Stout, 1 Case Gin, 2 Cases Hams and Bacon, and

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1 Case Waterproof Coats, marked G shipper at Liverpool, England, by James Gibson & Co., on the S. S. Cedric and transshipped at New York to the S. S. Alleghany, consigned to B. P. Reid, at Petit Goave, of the value of £14.5.5 or $69.74.

Also 32 Bundles Bedsteads, 1 Case Brass Bedsteads and fittings, 1 Bale Mattresses and 1 Case Combs, cotton and boots, marked C. D. shipped at Liverpool, England, by F. Farah on the S. S. Laurentic, and transhipped at New York on the S. S. Alleghany, consigned to order at Aux Cayes, of the value of £83.14.8, or $417.78.

Eighth. That insurance was effected upon all of the merchandise mentioned in the preceding (Seventh) article hereof, by or
77 on behalf of the respective owners thereof, and for the full values thereof, with the libellant London Assurance Corpora-

70 (2) In having passed her helm upon hearing her signal of one whistle, and (3) in having kept a proper lookout after the Allegheny had blown a signal of two whistles.

Eleventh. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore the libellants pray that process may issue against the respondent Furness, Withy & Company, Limited, citing it to appear and answer all and singular the matters aforesaid, and that a decree may be entered against said respondent in favor of the libellants Federal Insurance Company in the sum of $15,005.87, in favor of the Sea Insurance Company, Limited, in the sum of $5,529.62, and in favor of the London Assurance Corporation in the sum of $1,229.62, amounting together to $21,785.11, with interest and costs, and that the libellants may have such other or further relief as may be just.

KNEELAND, HARRISON & HEWITT,
Proctors for Libellants.

SOUTHERN DISTRICT OF NEW YORK, ss:

Henlon Chubb, being duly sworn, deposes and says that he is Vice-President of the libellant Federal Insurance Company, and is a member of the firm of Chubb & Son, the Managers of the United States Branches of the libellants Sea Insurance Company, Limited and London Assurance Corporation. That the foregoing libel is true to the best of his knowledge, information and belief. That the sources of his information and the grounds of his belief as to the matters therein alleged are the records in the New York office of his firm, and statements in the log of the steamship Pomaron.

HENLON CHUBB.

Sworn to before me this 30th day of November, 1902.
[SEAL.] LOUIS H. MAY,
Notary Public, Kings County.

Certificate filed in New York County.

[Endorsed:] Libel filed Dec. 3, 1902.

81 To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The answer of Furness, Withy & Company, Limited, to the libel of the Federal Insurance Company, the Sea Insurance Company, Limited, and London Assurance Corporation, in a cause of collision, civil and maritime, alleges as follows:

First. The respondent admits the first article of the libel.

Second. The respondent admits the second article of the libel.

Third. The respondent admits that a collision occurred on February 2nd, 1902, between the steamships Pomaron and Allegheny in the Atlantic Ocean, and that the Allegheny shortly after-

wards sank. Further answering the respondent denies any knowledge or information sufficient to form a belief as to the other allegations of the third article of the libel.

Fourth. The respondent denies any knowledge or information sufficient to form a belief as to the allegations of both articles of the libel marked "Fourth."

Fifth. The respondent denies any knowledge or information sufficient to form a belief as to the allegations of the fifth article of the libel.

Sixth. The respondent denies any knowledge or information sufficient to form a belief as to the allegations of the sixth article of the libel.

Seventh. The respondent denies any knowledge or information sufficient to form a belief as to the allegations of the seventh
82 article of the libel.

Eighth. The respondent denies any knowledge or information sufficient to form a belief as to the allegations of the eighth article of the libel.

Ninth. The respondent denies that the facts and circumstances of the collision are accurately set forth in the ninth article of the libel and alleges that the true facts as to said collision are set forth in the twelfth article of this answer.

Tenth. The respondent denies each and every allegation as to fault on the part of the steamship Pomaron alleged in the tenth article of the libel.

Eleventh. The respondent admits jurisdiction and denies the other allegation of the eleventh article of the libel.

Twelfth. Further answering the respondent alleges as follows:

On February 1, 1912, the *Pomaron*, which is a steel screw steamship of 1,809 tons gross, 1,127 tons net, 278 feet long, 405 feet beam and 20.5 feet in depth of hold, left Baltimore bound for Leith laden with grain and general cargo. She passed Cape Henry between midnight and 1 A. M. on the 2nd, and set a course E. by N. ¼ N. magnetic, her compass course being E. by N., which course she maintained until just before the collision. The weather was fine and clear and the wind a moderate breeze from the west. The ship was making about nine knots an hour.

About 10:35 A. M. the first officer of the Pomaron, who
83 was in charge of her navigation, sighted on the port bow a steamship, distant about ten miles, which was apparently steering a course about south. The bearing of this vessel, which proved to be the Allegany, did not change as she approached but the Pomaron kept her course and speed until she saw that the Allegany was doing nothing whatever to keep out of the way of the Pomaron. The first officer of the Pomaron, therefore, blew one blast of his whistle and at the same time ordered the helm a little to port. Shortly afterwards the Allegany suddenly blew a signal of two blasts indicating that she was directing her course to port with the intention of crossing the Pomaron's bows, seeing that a collision was inevitable, the first officer of the Pomaron ordered the engine full speed astern and the helm put hard-a-port in an effort

to ease the blow. The Alleghany kept on at full speed across the Pomaron's bows, at the last moment swinging apparently under a starboard helm, and the vessels came together, the Pomaron's stem striking the Alleghany a glancing blow on her starboard side abaft the engine room. The way of the Pomaron was almost checked at the time of the collision, but the Alleghany was swinging rapidly to port and went on at full speed for some distance. The Pomaron stood by to render assistance and took all the crew and passengers on board when it was found that the Alleghany was sinking.

Thirteenth. By reason of the collision the Pomaron was seriously damaged, her bow and stem being twisted to starboard, her port anchor lost and many of her plates and frames broken.

84 Fourteenth. The collision was not caused or contributed to by any negligence on the part of the Pomaron or of those in charge of her, but was due solely to the negligence of the Alleghany in the following respects among others:

1. In that a good lookout was not maintained.

2. In that there was no officer or any competent person in charge of her navigation for some time prior to the collision.

3. In that although she had the Pomaron on her starboard hand she did not keep out of the way of the Pomaron.

4. In that she made no change of course until too late to avoid a collision.

5. In that she starbourded her helm, and attempted to cross the Pomaron's bows.

6. In that she did not port her helm or stop and reverse in time to avoid a collision.

7. In that she did nothing to avoid a collision.

All and singular the premises are true.

Wherefore the respondent prays that the libel herein may be dismissed, with costs.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Respondent.

SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

Charles C. Burlingham, being duly sworn, says: I am a member of the firm of Burlingham, Montgomery & Beecher, proctors for the respondent herein. I have read the foregoing answer and
85 the same is true to the best of my knowledge, information and belief. The sources of my knowledge and information are statements by the master, officers and crew of the Pomaron. The reason why I make this verification is that the respondent is a foreign corporation none of whose officers is within the City of New York.

CHARLES C. BURLINGHAM.

Sworn to before me this 7th day of January, 1913.

[SEAL.] ROBINSON LEECH,
Notary Public, Kings County.

Certificate filed in New York County.

[Endorsed:] Answer filed January 8, 1913.

86 United States District Court, Southern District of New York.

At the January Term, in the Year One Thousand Nine Hundred and Thirteen.

Before the Honorable Judges of the District Court.

The libel of the United States of America against Furness, Withy & Company, Limited, in a cause of collision, civil and maritime, by its attorney, Henry A. Wise, United States Attorney for the Southern District of New York, alleges on information and belief as follows:

First. The libellant is a corporation sovereign.

Second. The respondent, Furness, Withy & Company, Limited, at all the times hereinafter mentioned, was and still is a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, and for many years last past, has maintained a principal office for the transaction of business in the City, County and State of New York, in the Southern District of New York. It has also for many years maintained, owned and operated steamers for the carriage of freight from various ports in the United States to various ports in foreign countries.

Third. At all the times hereinafter mentioned, the Hamburg-Amerikanische Packetfahrt Actien-Gesellschaft was the sole owner of the German steamship Alleghany and the respondent, Furness, Withy & Company, Limited, was the sole owner of the British steamship Pomaron. On or about January 31, 1912, the libellant delivered at the Port of New York to the steamship Alle-
87 ghany, and shipped in good order and condition thereon a large number of sacks of both registered mail and ordinary mail, the contents of the said sacks being destined to various ports in the Republic of Hayti and Colombia and in the Province of the Bahama Islands; the value of the contents of the said sacks was in the neighborhood of $50,000. The said steamship Alleghany proceeded from the Port of New York on or about the first day of February, 1912, bound to Inagua, the Island of Hayti and other West Indian ports.

Fourth. On or about the 2nd day of February, 1912, at about 11 A. M. while the said steamship Alleghany was bound on the voyage to the ports aforesaid, and at a point in the Atlantic Ocean about 90 miles east of Cape Henry, the said steamship Pomaron collided with the steamship Alleghany and caused such injury and damage to her that she afterwards sank and became a total loss, together with all her cargo, including the mail aforesaid. The libellant has no means of knowing precisely the circumstances of the collision aforesaid but it is informed and believes that the following are the circumstances thereof:

The Alleghany was proceeding on a course of approximately south and the Pomaron on a course of approximately east. The weather was clear, the wind was high, the sea was rough and both vessels were proceeding at full speed or nearly so.

The vessels were on crossing courses, the Alleghany, having the Pomaron on her own starboard hand; notwithstanding this situation the Alleghany starboarded her helm in an effort to cross the course of the Pomaron and neglected to stop and reverse
88 in sufficient time to avoid a collision. The Pomaron gave no signal of her approach until just before the collision when she blew two whistles, but she did not slacken or reverse her speed in sufficient time to prevent a collision. The result was that the Pomaron collided with the Alleghany, striking her on the starboard side at about a right angle between hatches 3 and 4, inflicting such injury that as a result thereof and at about 3.15 in the afternoon of the same day the Alleghany sank and became a total loss. The loss of the mail above referred to was not caused or contributed to by any fault on the part of the libellant but was caused or contributed to on the part of both steamers as follows:

(*a*) On the part of the Alleghany: (1) in that a good and sufficient lookout was not maintained, (2) In that she failed to keep out of the way of the Pomaron, (3) In that both vessels were approaching each other at right angles, or nearly so, involving risk of collision, and the Alleghany starboarded her helm and attempted to cross ahead of the Pomaron and failed to stop and reverse in sufficient time to avoid a collision, (4) In that the Alleghany failed to sound whistle signals indicating her manoeuvers immediately before the collision, and in sufficient time to avoid a collision, and in that she altogether omitted the reversing signals; and (5) In other respects to be shown at the trial.

(*b*) On the part of the Pomaron: (1) In that a good and sufficient lookout was not maintained; (2) In that the said steamer failed to hold her course and speed in approaching the Al-
89 leghany and failed to reverse sufficiently and in time to avoid a collision; (3) In that she changed her course and speed immediately prior to the collision, so that she struck the Alleghany on the starboard side, without indicating her manoeuvers with appropriate whistle signals; and (4) In other respects to be shown at the trial.

All and singular the premises of this libel are true and within the admiralty and maritime jurisdiction of this Court.

Wherefore the libellant prays that process in due form of law issue against the respondent with a clause of foreign attachment, citing it to appear and answer all and singular the matters aforesaid, and in case the respondent cannot be found within this District, that then its goods and chattels be attached to the amount sued for and that this Honorable Court may be pleased to decree the payment of the amount of the damages aforesaid with costs against the said respondent and that it may have such other and further relief as may be just and proper in the premises.

HENRY A. WISE,
United States Attorney for the Southern District of New York, Proctor for Libellant.

Office and Post Office Address, Room 50 U. S. Court House & P. O. Bldg., Borough of Manhattan, City of New York.

90 To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The answer of Furness, Withy & Company, Limited, to the libel of the United States of America, in a cause of collision, civil and maritime, alleges as follows:

First. The respondent admits the first article of the libel.

Second. The respondent admits the second article of the libel.

Third. The respondent admits that the German steamship Alleghany and the British steamship Pomaron were owned as alleged in the third article of the libel. Further answering the respondent denies any knowledge or information sufficient to form a belief as to the other allegations of the third article of the libel.

Fourth. The respondent admits that at about 11 A. M. on February 2nd, 1912, the Alleghany and Pomaron were in collision at a point in the Atlantic Ocean east of Cape Henry and that the Alleghany afterwards sank and became a total loss and further admits jurisdiction. Further answering the respondent denies that all and singular the premises of the libel are true and further denies each and every allegation of fault on the part of the Pomaron and further denies that the facts and circumstances of said collision are fully or accurately set forth in the fourth article of the libel and alleges that the true facts as to said collision are set forth in the fifth article of this answer.

91 Fifth. Further answering the respondent alleges as follows:

On February 1, 1912, the Pomaron, which is a steel screw steamship of 1,809 tons gross, 1,127 tons net, 278 feet long, 40.5 feet beam and 20.5 feet in depth of hold, left Baltimore bound for Leith laden with grain and general cargo. She passed Cape Henry between midnight and 1 A. M. on the 2nd, and set a course E. by N. ¼ N. magnetic, her compass course being E. by N., which course she maintained until just before the collision. The weather was fine and clear and the wind a moderate breeze from the west. The ship was making about nine knots an hour.

About 10:35 A. M. the first officer of the Pomaron, who was in charge of her navigation, sighted on the port bow a steamship, distant about ten miles, which was apparently steering a course about south. The bearing of this vessel, which proved to be the Alleghany, did not change as she approached but the Pomaron kept her course and speed until she saw that the Alleghany was doing nothing whatever to keep out of the way of the Pomaron. The first officer of the Pomaron, therefore, blew one blast of his whistle and at the same time ordered the helm a little to port. Shortly afterwards the Alleghany suddenly blew a signal of two blasts indicating that she was directing her course to port with the intention of crossing the Pomaron's bows. Seeing that a collision was inevitable, the officer of the Pomaron ordered the engines full speed astern and the helm put hard-a-port in an effort to ease the blow. The Alleghany kept on at full speed across the Pomaron's bows, at the last moment swinging apparently under a star-

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board helm, and the vessels came together, the Pomaron's
92 stem striking the Alleghany a glancing blow on her starboard side abaft the engine room. The way of the Pomaron was almost checked at the time of the collision, but the Alleghany was swinging rapidly to port and went on at full speed for some distance. The Pomaron stood by to render assistance and took all the crew and passengers on board when it was found that the Alleghany was sinking.

Sixth. By reason of the collision the Pomaron was seriously damaged, her bow and stem being twisted to starboard, her port anchor lost and many of her plates and frames broken.

Seventh. The collision was not caused or contributed to by any negligence on the part of the Pomaron or of those in charge, but was due solely to the negligence of the Alleghany in the following respects among others:

1. In that a good lookout was not maintained.
2. In that there was no officer or any competent person in charge of her navigation for some time prior to the collision.
3. In that although she had the Pomaron on her starboard hand she did not keep out of the way of the Pomaron.
4. In that she made no change of course until too late to avoid a collision.
5. In that she starboarded her helm, and attempted to cross the Pomaron's bows.
6. In that she did not port her helm or stop and reverse in time to avoid a collision.
7. In that she did nothing to avoid a collision.

All and singular the premises are true.

93 Wherefore the respondent prays that the libel herein may be dismissed, with costs.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Respondents.

SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

Everett Masten, being duly sworn, says: I am a member of the firm of Burlingham, Montgomery & Beecher, proctors for the respondent herein. I have read the foregoing answer and the same is true to the best of my knowledge, information and belief. The sources of my knowledge and information are statements by the master, officers and crew of the Pomaron. The reason why I make this verification is that the respondent is a foreign corporation none of whose officers is within the City of New York.

EVERETT MASTEN.

Sworn to before me this 8th day of January, 1913.

[SEAL.] ROBINSON LEECH,
Notary Public, Kings County.

Certificate filed in New York County.

[Endorsed:] Answer filed Jan. 9, 1913.

LOSE IN CENTER

94 United States District Court, Southern District of New York.

YANG-TSZE INSURANCE ASSOCIATION, LTD., and HERBERT APPLETON and Douglas F. Cox, Attorneys in Fact for the Subscribers at the U. S. Lloyds, and the Indemnity Mutual Marine Assurance Co., Ltd., and Nord Deutsche Insurance Co., et al.,

against

FURNESS, WITHY & COMPANY, LIMITED, and HAMBURG-AMERIKANische Packetfahrt Actien-Gesellschatt, in a Cause of Collision, Civil and Maritime.

Before Hon. Learned Hand, Judge.

January 13, 1913.

Appearances:

Convers & Kirlin, Esquires (Mr. Kirlin and Mr. McGrann), for the Yang-tsze Insurance Association, Ltd., and Nord-Deutsche Insurance Company.

Burlingham, Montgomery & Beecher, Esquires (Mr. Burlingham, Mr. Leech and Mr. Wells, for the Pomaron.

95 Harrington, Bigham & Englar, Esquires (Mr. Harrington), for certain Cargo Claimants.

Kneeland, Harison & Hewitt, Esquires (Mr. Kneeland), for the Federal Insurance Company, the Sea Insurance Company and the London Assurance Corporation.

Henry A. Wise and A. S. Pratt, Esquires (Mr. Pratt), for the United States.

Wiliam Silsbe, Esquire (Mr. Cheyney), for the Boston Insurance Company.

Haight, Sandford & Smith, Esquires (Mr. Haight and Mr. Crowell), for the Alleghany.

Mr. Kirlin: The only claims before your Honor here are claims relating to the cargo of the Alleghany.

We prepared our libels without knowing all the facts and there are therefore some errors we wish to correct. If your Honor will look at the libel of the Yang-tsze Insurance Association, page 9, paragraph 11, in the third sentence we ask to strike out "through falling snow without sounding signals as required by Article 16 of the International Rules." That is an entire mistake.

Motion granted.

Mr. Kirlin: A little further down the page, in the sentence reading "the Pomaron after learning of the presence, * * * first gave a single short blast on her whistle without making corresponding change of helm," and so forth, we ask to strike out "without." It turned out that she did make a change.

96

Mr. Burlingham: We object to that being stricken out, because it will be argued that we did or did not do three or four different things,

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and we would like to have Mr. Kirlin's position stated so that we can tell what to answer in our argument.

Mr. Kirlin: Our position now is definite. It is that that should be changed.

The Court: I will not physically change it, but I will grant an order amending the present libel, which I understand is inconsistent with itself. I strike out the word "without."

Mr. Kirlin: On page 10 where we charge as a second fault the matter which has already been deleted by your Honor's order we ask that it be deleted.

Motion granted.

Mr. Kirlin: And in the third charge of fault we ask that "without" be deleted.

We also move to make the same changes in the libel of the Nord-Deutsche Insurance Company, which is identical in form with that of the Yang-tsze Insurance Association.

Motion granted.

Mr. Kneeland: We would like to make one change in the libel of the Federal Insurance Company. On page 8, Article 9, we have alleged that the magnetic course of the Pomaron was E. ¾ N. We computed the ¼ of a point deviation the wrong way. It should be E. by N. ¼ N.

Motion granted.

97 Mr. Kirlin: We offer in evidence in support of the claim of the Yang-tsze Insurance Association, Limited, referred to in paragraphs 5 and 12 of the libel of the Yang-tsze Insurance Association, Limited, et al., against Furness Withy & Company, Limited, certain bills of lading, invoices and assignment of Huttlinger & Struller, fastened together, and marked "Libellants' Exhibit 1"; also certain bills of lading, invoices and assignment of Central Railroad of Haiti, fastened together, and marked "Libellants' Exhibit 2."

We offer in evidence in support of the claim of Herbert Appleton and Douglas F. Cox, attorneys in fact for individual underwriters, subscribers at United States Lloyds, referred to in paragraphs 6 to 9 inclusive, and paragraph 13 of the said libel, certain bills of lading, invoices and assignments of Cohen & Company, fastened together, and marked "Libellants' Exhibit 3"; also certain bills of lading, invoices and assignment of Huttlinger & Struller, fastened together, and marked "Libellants' Exhibit 4"; also certain bills of lading, invoices and assignment of the Kny-Scheerer Company, fastened together, and marked "Libellants' Exhibit 5"; also certain bills of lading, invoices and assignment of M. C. D. Borden & Sons, fastened together and marked "Libellants' Exhibit 6"; also certain bills of lading, invoices and assignment of The Carter's Ink Company, fastened together and marked "Libellants' Exhibit 7."

98 We offer in evidence in support of the claim of The Indemnity Mutual Marine Assurance Company, Limited, referred to in paragraphs 10 and 14 of the said libel, and in the order amending the said libel, certain bills of lading, invoices and assignment of Vacuum Oil Company, fastened together and marked "Libellants' Exhibit 8"; also certain bills of lading, invoices

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and assignment of Achille Starace, fastened together and marked "Libellants' Exhibit 9."

We offer in evidence in support of the claim of Nord-Deutsche Insurance Company, referred to in paragraphs 8 and 15 of the libel of Nord-Deutsche Insurance Company, et al., against Furness, Withy & Company, Limited, and in the order amending said libel, certain bills of lading, invoices and assignment of Armour & Company, fastened together and marked "Libellants' Exhibit 1"; also certain bills of lading, invoices and assignment of Morris & Company, fastened together and marked "Libellants' Exhibit 2."

We offer in evidence in support of the claim of Union Insurance Society of Canton, Limited, referred to in paragraphs 9 and 16 of the said libel, certain bills of lading, invoices and assignment of Purgold & Company, fastened together and marked "Libellants' Exhibit 3."

We offer in evidence in support of the claim of Commercial Union Assurance Company, Limited, referred to in paragraphs 10 and 17 of the said libel, certain bills of lading, invoices and as-
99 signment of Daniel Miller Company, fastened together and marked "Libellants' Exhibit 4."

We offer in evidence in support of the claim of The Corporation of Lloyds, referred to in paragraphs 11 and 18 of the said libel, certain bills of lading, invoices and assignment of Roberto Vargas, fastened together and marked "Libellants' Exhibit 5."

We offer in evidence in support of the claim of Ætna Insurance Company, referred to in paragraphs 12, 13 and 19 of the said libel, certain bills of lading, invoices and assignment of the Autopiano Company, fastened together and marked "Libellants' Exhibit 6"; also certain bills of lading, invoices and assignment of Lyon Company, fastened together and marked "Libellants' Exhibit 7."

Mr. Kneeland: On behalf of the Federal Insurance Company et al. against Furness, Withy & Company, Limited, we offer in evidence the following exhibits:

Exhibit 1, bills of lading and invoices for nineteen shipments of merchandise by G. Amsinck & Company and assignment from G. Amsinck & Company to Federal Insurance Company.

Exhibit 2, bills of lading and invoices for four shipments of merchandise by J. A. Pauli & Company and assignment from J. A. Pauli & Company to Federal Insurance Company.

Exhibit 3, bill of lading and invoice of a shipment of merchandise by Yglesias Lobo & Company and assignment from
100 Yglesias Lobo & Company to Federal Insurance Company.

Exhibit 4, bill of lading and invoice of shipment of merchandise by Singer Sewing Machine Company and assignment from Singer Sewing Machine Company to Federal Insurance Company.

Exhibit 5, bills of lading and way bill for shipment of merchandise by A. Fauconnet for account of Achille Starace and assignment from Achille Starace to Federal Insurance Company.

Exhibit 6, bills of lading and invoice for shipment of merchandise by C. H. Pattengill and original certificate of insurance duly endorsed.

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On behalf of the Sea Insurance Company, Limited, we offer in evidence the following exhibits:

Exhibit 7, bill of lading and invoice for a shipment of merchandise by George Lueders & Company and assignment from George Lueders & Company to Sea Insurance Company, Limited.

Exhibit 8, registered mail receipts, letter from Assistant Postmaster, New York City, and invoice for two registered mail packages sent by Isaac Brandon & Brothers, and assignment from Isaac Brandon & Brothers to Sea Insurance Company, Limited.

Exhibit 9, bill of lading and six invoices for shipment of merchandise by United Steel Products Company and assignment from United Steel Products Company to Sea Insurance Company, Limited.

On behalf of the London Assurance Corporation we offer
101 in evidence the following exhibits:

Exhibit 10, bills of lading and invoices for two shipments of merchandise by O. C. Kanzow & Company, and assignment from O. C. Kanzow & Company to London Assurance Corporation.

Exhibit 11, bill of lading and invoice for shipment of merchandise on steamship Cedric by James Gibson & Company, letter from Hamburg-American Line advising of transshipment of same on Alleghany, and assignment from James Gibson & Company to London Assurance Corporation.

Exhibit 12, bill of lading and invoice for shipment of merchandise on steamship Leurentic, by F. Farah, letter from Hamburg-American Line advising of trans-shipment of same on Alleghany, and assignment from F. Farah to London Assurance Corporation.

Mr. Haight: The Alleghany was bound south and the Pomaron was bound east out of Norfolk, they were going approximately at right angles and collided about mid-day at sea. The chief officer of the Alleghany was one of the best men the Hamburg Line ever had and he thought he was actually at sea with nobody within a thousand miles of him. The Pomaron struck us a little aft of amidships on the starboard side, and did so much damage that in a few hours the Alleghany went down to the bottom with everything she had on board. The crew were saved. We filed a petition for limitation of liability and we offer here the petition for limitation of
liability and the depositions that have been taken to show
102 there was no privity on behalf of the Hamburg Line and that nobody is claiming more than the freight.

Mr. Crowell: In the limitation of liability case we offer two depositions, with an exhibit. Our freight has been surrendered and the amount fixed. The claims for the cargo have been filed with Mr. Gilchrist and the only question now is whether we are entitled to a decree.

Mr. Kneeland: We have filed no claim in that proceeding.

Mr. Harrington: We understand that it is agreed that the several libellants for whom we are acting had cargo on the Alleghany and that it was lost as a result of this collision with the steamship Pomaron. That the formal proofs, the bills of lading and other docu-

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mentary proof, and the extent thereof, are waived at this time, to be produced on a reference herein, if any.

Mr. Burlingham: We agree to that.

Mr. Cheyney: We agree to that.

Mr. Kirlin: Mr. Pratt has a claim for registered mail that was lost and we presume that Mr. Burlingham will make the same stipulation with reference to the claim of the United States as he has made with the other counsel.

Mr. Burlingham: We make the same stipulation.

Mr. Kirlin: We offer in evidence the entire cross-examination (pp. 45 to near bottom of 66) of William A. Westgarth, late chief officer of the Pomaron, taken at Newport News, Virginia,
103 June 7, 1912. Also the recross-examination beginning on page 69 and extending to the top of page 75.

We ask Mr. Burlingham to prove the original log of the Pomaron.

Mr. Burlingham: We produce the log.

It is marked Exhibit 10, January 13, 1913.

Mr. Kirlin: We also offer in evidence from the testimony of John Hyslop, the wheelman, taken at the same time and place as that of the chief officer, the entry of Friday, February 2, 1912, pages 41 to 43.

Mr. Kirlin: We call upon counsel to produce the original engineer's log.

Mr. Burlingham: We produce it.

Mr. Kirlin: We offer in evidence from the engineer's log of February 2, subject to comparison, a copy of the document as it appears after page 82 in the deposition of Charles Johnson, chief engineer of the Pomaron.

It is marked Exhibit 11, January 13, 1913.

Mr. Kirlin: Have you produced the scraplog which we asked for?

Mr. Burlingham: The chief officer said it disappeared when the crew of the Alleghany left.

Mr. Kirlin: Have you produced, in response to our call, the report made by the master of the Pomaron to the British Board of Trade?

Mr. Burlingham: We produce a copy of it.

The report is offered in evidence. It is marked Exhibit 12, January 13, 1913.

The report of the chief officer is offered in evidence. It
104 is marked Exhibit 12*a*, January 13, 1913.

Mr. Kirlin: Under stipulation dated January 8, 1913, providing that any party may introduce in evidence such portion of the log-book as he may wish, we offer in evidence from this exhibit the statement of the course of the Alleghany, as follows:

South 2 degrees west, true; and the distance that she made in the four hours preceding—from 4 to 8—46 miles, showing her speed. That is the last complete four hours of which there is any record.

We offer in evidence the sheet on which that information is contained.

It is marked Exhibit 13, January 13, 1913.

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MARTIN G. KINDLUND, being duly sworn and examined as a witness for the cargo claimants, testifies:

By Mr. Harrington:

Q. What is your profession?
A. Marine architect.
Q. How long have you been engaged in that profession?
A. About one year.
Q. Where were you educated?
A. Webbs Academy of Naval Architecture and Marine Engineering.
Q. What experience have you had in a practical way since your graduation?
A. I have been chief draughtsman of the Staten Island Ship Building Company for four years. I have been employed in various shipyards in this country and in Europe. I have been assistant to Mr. George B.——
105 Q. You are now in private practice?
A. Yes, I am now in private practice.

By the Court:

Q. How old are you?
A. I am thirty-two.

By Mr. Harrington:

Q. At my request have you made some calculations and a diagram with respect to the collision between the Alleghany and the Pomaron on February 2, 1912, based on various hypothesis submitted to you by me?
A. Yes.
Q. Assuming, if you please, the steamers Alleghany and Pomaron coming into collision on February 2, 1912, in latitude 37 degrees 32 minutes north, longitude 74 degrees west, in the North Atlantic off the Virginia coast. The Alleghany was bound from New York to Haiti. The Pomaron was bound from Baltimore to Leith. The collision occurred in broad daylight, shortly after 11 o'clock in the morning. The Alleghany's course was south four degrees west magnetic. The Pomaron's course was east by north, which with a correction for the variation gave a course east by north, ¼ north magnetic. The Alleghanys' speed was 11½ knots; the Pomaron's speed was 9 knots. The testimony of the Pomaron is as follows: When the steamers were at a distance, variously estimated, the compass bearing of the Alleghany was taken and found to be northeast. Presumably, the same correction should be made here as above, which would give a bearing of northeast ¼ north magnetic. At some time after the taking this compass bearing the Pomaron's helm was ported slightly and remained ported for about one min-
106 ute, during which time her heading was changed about one point. Her engines were then reversed at full speed and her helm put hard-a-port which maneuver was continued until the collision, four minutes later. At the time of the collision the Pomaron

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had been brought to a heading of east southeast. In the meanwhile the Alleghany had starboarded her helm very shortly after the helm of the Pomaron was ported, and at the time of the collision the Alleghany had reached a heading of about southeast by south. For the purposes of this problem, the Alleghany's helm may be taken to have been put hard to starboard, at the same time the Pomaron's helm was put hard to port. The Pomaron's chief officer, who was in charge of her navigation estimates that her speed from the time she put her engines full speed astern until the collision was as follows: the first minute the reduction in her speed would be negligible; at the end of the second minute she would be going 7 knots; at the end of the third minute, 4½ knots; at the end of the fourth minute, about 2 knots. So that her speed at the time of the collision had been reduced to, say, 2 knots. No change was made in the speed of the Alleghany. With those questions before you, have you made a diagram of your calculations and the results?

A. Yes, I have one here.

Q. Upon the hypotheses I have incorporated in the foregoing question I ask you, first, assume that the Alleghany was seen from the Pomaron at a bearing of northeast at any time before either vessel had changed its course or speed, was there any possibility of collision if each vessel held her course and speed?

A. No, sir.

Q. If on those respective courses the Pomaron had at any
107 time sighted the Alleghany at a bearing of northeast, what would have happened if each vessel held her course and speed?

A. The Alleghany would have crossed the Pomaron's bows.

By the Court:

Q. How far off?

A. The length of the Alleghany's course is shorter than that of the Pomaron's, and the speed of the Alleghany is more than that of the Pomaron, there is no question about it at all.

Q. How far off?

A. I haven't figured that out.

Q. You can find out?

A. I can find out, yes, sir. I haven't found that out, I can find it quite easily. It is so evident that she would have cleared by a very wide margin I didn't trouble to find that out; it would be a very wide margin.

By Mr. Harrington:

Q. Would you venture an approximation, when you say "a very wide margin"?

A. No.

Q. The second question I wish to put to you is, working backward from the point of collision on the data I gave you in the long question we wish to fix the point at which the Pomaron was when she made her first change of course and to ascertain whether at such

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point there was any danger of collision in case each vessel held her course and speed. Have you made such a calculation?

A. I have.

The Court: Do you mean after she began to port, if she had kept on? He has already answered that if she held her course there would be no collision.

Mr. Harrington: The first question is based on the north-
108 east bearing. That is distinctly set down in the log-book, and if there ever were such a bearing there could be no collision, all counsel must agree to that. However, they are repudiating that entry in the log, which we will urge they have to stand by and they are now giving us something else. We say, very well, we will take it and show that the collision would not have happened if she had held her course and speed.

The second position is this: we have no bearing—we can calculate that most certainly because they have taken away the northeast.

We have the course of the Pomaron——

Mr. Burlingham: Let the gentleman put the question. The witness should not be instructed, but should be examined.

Mr. Harrington: They have given us the point of collision. He has given the distance he went in the last minute before the collision, the minute before that and before that, and finally he is near his original course. Now, I take him back another minute.

The Court: I understand now.

Q. Referring to your diagram, will you explain how you worked back from the point of collision and arrived at the precise point on her original course the Pomaron was on at the time she ported her helm?

A. Working back from that time, it has been testified that the speed of the Pomaron at that moment was 2 knots; one minute before that the speed was 4½ knots; two minutes before the collision,
7 knots; three minutes before the collision, 9 knots; four
109 minutes, 9 knots, and so on back. Using the average speeds for the intervals of the various minutes I have plotted a curve showing the position of the Pomaron at those times, and I have taken a certain path that the steamer would naturally follow with the helm ported, and I find that four minutes from the time of the collision the Pomaron was where it is shown, and that is the time when the helm was put hard to port. Five minutes before the collision occurred the Pomaron was on her course and it was then the chief officer testifies that the first change was made. I have taken the course of the Pomaron, the original course, as E. by N. ¼ N. I have taken the position of the Pomaron at the time of the collision to be E. S. E., and those of course give two very definite positions. I have also taken into account the fact that between the four and five minutes back from the time of the collision the ship changed her course one point. From the fourth minute back until the collision occurred I have made a gradual change in the ship's course and the propeller was backing, and of course the speed became less, and the various positions of the ship are shown on this diagram.

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In doing this I have attempted to give the exact position of the Pomaron five minutes before the collision occurred with reference to the course of the Alleghany. That was my intention.

Q. The position you have given the Pomaron at the four minutes before the collision point, was that taken as the time when she began to hard-a-port?

A. Yes, it was.

Q. She had then made a change of one point in her heading from your original course?

A. Yes, sir.

110 Q. And as you have given the vessels in collision you have given the heading of the Pomaron as I gave it in the question?

A. Yes.

Q. So between the four minutes and the collision positions you have drawn a gradual curve as you calculated it would be between those two definite fixed headings?

A. Yes, sir.

Q. Taking the Pomaron in the position marked "5 m.," the last on her original course, how have you fixed the position of the Alleghany with reference to the Pomaron at that time?

A. I have assumed, which is also correct, that the Alleghany did not change her speed throughout her course, that she maintained 11½ knots as her speed. I have assumed that she started to change her course at the same time the Pomaron did and working from that data, or using it, I have worked back from the position of the Alleghany at the collision, which was S. E. by S., worked back to four minutes previous to the collision. Then from that point I have drawn the course of the Alleghany, which was S. 4 degrees W.

The Court: Her turning course might be different.

The Witness: You see the note I have put on there, that curve I have shown there—I call it "Q"—represents the path of the Alleghany with the helm starboarded four minutes before the collision, and turning at a gradual increasing rate—which I do not know exactly——

By the Court:

Q. You mean assuming her helm after one minute was starboarded and kept where it was then?

A. Yes, sir.

111 By Mr. Harrington:

Q. In figuring that curve did you take into account the exact heading of the Alleghany at the time of the collision as given in the long question?

A. Oh, yes.

Q. And her exact heading before she made any change at all?

A. Yes.

Q. So that in figuring that curve you took into account a fixed

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heading before the curve started and a fixed heading at the end of the curve and made the curve as gradual as you could in between?

A. Yes.

Q. Referring to your diagram, to the position in which you put the Allegheny five minutes before the collision, I notice a broken line running across from that position to the position of the Pomaron at the five minutes before the collision?

A. Yes.

Q. What is the distance across there?

A. It measures about 5,950 feet.

Q. Just about a mile?

A. Very close to one mile.

By the Court:

Q. What would happen if each kept its course?

A. If each kept its course the Pomaron would have reached the line of the course of the Alleghany at a certain time which I have called 2 minutes and 27 seconds before the collision actually occurred. I reckon my time from the moment the collision occurred. At that moment, 2 minutes and 27 seconds before the collission occurred, the Alleghany would have been 1,600 feet from the point of intersection of the two courses, showing that the Pomaron would have crossed the Alleghany's bows, 1,600 feet away.

112 Q. A quarter of a mile?

A. Over that.

Q. And taking the position that you have marked "5 m." of the Pomaron on your diagram, at which time as I understand it the Alleghany would have been at the point marked "5 m." on the Alleghany's course, what would have been the bearing of the Alleghany on the port bow of the Pomaron when a mile away?

A. The actual bearing would be N. N. E. ½ E.

Q. How many points?

A. Four and one-quarter points.

Q. Are you sure it is ¼?

A. Four and one-quarter points.

Q. So that in those relative positions if the Pomaron and Alleghany had each held her course and speed the Pomaron would have reached the point of intersection of their courses, protracted, at a time when the Alleghany was 1,600 feet away?

A. Yes.

Q. And away on the port side?

A. Yes.

Cross-examined by counsel for the Pomaron.

By Mr. Burlingham:

Q. Have you assumed there was no change of bearing of the Alleghany?

A. I have assumed that she changed her bearing during the four minutes before the collision occurred, apparently.

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Q. How about the previous time as it appears on this diagram?
A. Previous to that I have taken a course S. 4 degrees W.
Q. Where do you put her first in view on this diagram, the Alleghany, according to your diagram when does she first come in view? Specify the place on the diagram.
A. I have marked it "6 m.," which means 6 minutes before the collision occurred.

113 Q. Is there any change of bearing at 5 minutes?
A. No.
Q. None?
A. None.
Q. What do you say the bearing was at 6 minutes?
A. As far as the Pomaron is concerned there would be a very slight change.
Q. What is the bearing at 6 minutes?
A. At 6 minutes? I have not got it here, I can figure it out.
Q. How many points?
A. You can see.
Q. I want you to tell me how many points?
A. I can figure that out.
Q. You have never been a navigator?
A. I have only marked the actual bearing for the position marked "5 m."
Q. All I ask is, at the position which is marked "6 m." how did the Alleghany bear from the Pomaron, how many points on her port bow?
A. Very close to 4¼.
Q. Give it in degrees.
A. Forty-two degrees. About 47 degrees.
Q. Forty-seven or 42?
A. Forty-seven at the position "6 m."
Q. Take the next minute, "5 m." What is the bearing there of the Alleghany?
A. At "5 m.," 49 degrees.
Q. Are you sure you are right about that? Look at it carefully.
A. Forty-nine degrees; slightly greater than at "6 m."
Q. Then she was widening, was she?
A. She was widening.
Q. Are you able to tell what the bearing of the Alleghany was from the Pomaron at the point marked "7 m."?
A. At "7 m." about 46 degrees.

114 Q. What courses have you taken? I see them marked here "E. by N. ¼ N." Is that compass or magnetic course?
A. Magnetic course.
Q. What have you done about the Alleghany?
A. The course was S. 4 degrees W. magnetic.
Q. What is that at the lower part of the diagram, "Pomaron E. S. E.," what is that?
A. That was the bearing of the Pomaron.
Q. No, it is not the bearing.
A. The course of the Pomaron at the time of collision.

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Q. Was it magnetic?
A. I believe it was.
Q. Don't you know?
A. It was stated in that statement and I assumed that it was.
Q. Do you assume the same magnetic courses all the way through?
A. Yes, sir, certainly.
Q. It is important to know whether E. S. E. is magnetic or not?
A. Well, it is.
Q. It is not, as a matter of fact. It is the compass course. The truth is it is E. S. E. ¼ S. Doesn't that spoil your diagram?
A. To an extent.
Q. Only a little?
A. Very, very slightly.
Q. How about the Alleghany's course marked "S. E. by S."; is that magnetic?
A. That is magnetic, I have taken it to be so.
Q. You arrived at that course by putting the two boats at an angle of 45 degrees?
A. No. I have taken those courses from the statement that was provided me.
Q. We had no statement. You had no statement of the course of the Alleghany at the collision?
A. Yes, sir. It was testified to, I believe.

Mr. Harrington: I gave it to him.

Q. It has not been testified to at all. All we know from the testimony is that course of the Pomaron and the angle of collision was 45 degrees. If you have the course of the Pomaron wrong, how do you know the course of the Alleghany?
115
A. I have taken that from what was given me.
Q. Who gave it to you?
A. Mr. Harrington.

Mr. Harrington: I gave it to him in the hypothetical question.

Q. If the course of the Alleghany was not S. E. by S., but was S. E. by S. ¼ S. wouldn't that injure the diagram's accuracy also?
A. Slightly.
Q. When you put the original position of the Alleghany down at a distance of about a mile, 5,960 feet, did you attempt to place her at a position precisely N. E. of the Pomaron?
A. No.
Q. What did you try to do?
A. I didn't attempt to place her in any position relative to the Pomaron in the position of the Alleghany marked "5 m."
Q. At "6 m." I say?
A. "Six m." is obtained entirely by working back to the point of collision, to the point of time of the collision.
Q. You started at the point where they are in collision?
A. At "0 m."
Q. If that is wrong, perhaps the rest is wrong?

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A. The angle between the two courses at the time of collision is about 35 degrees, about three points.

Q. Have you made such drawings as these before? Is this your first effort or are they frequent?

A. What do you mean?

Q. To make a diagram of a collision from data furnished; did you ever do it before?

A. No, I can't say that I have just that way.

Q. Don't you regard it as of considerable importance to know whether courses are magnetic or compass courses?

A. Certainly.

116 Q. You would prefer to have that fact made clear to you before you began your work?

A. I took them to be so.

Q. I tell you according to the testimony in this case, undisputed testimony, there was no change at all in the bearing of the Alleghany from the Pomaron prior to the change of course by the Pomaron. Does that make any difference to you in your confidence in the accuracy of your diagram?

Mr. Harrington: That is not undisputed.

A. If that is actually so, it might make a little difference in the accuracy of the diagram; but I do not know that to be true.

By the Court:

Q. Tell me the bearing of the Alleghany from the Pomaron, first, at the point indicated as "4 m." for each vessel; and, second, at the place which you marked "4 m." as her position.

A. Do you wish it in degrees or points?

Q. I would like you to give it in degrees.

A. From the curved course, 69 degrees. The straight course assumed, 53 degrees. Joining the curved courses 4 and 5, do you wish?

Q. I want the bearing of the two ships changed as they continued on their courses.

A. I wish to correct that to 64 degrees.

Q. When the Pomaron was here, how far off her port bow was this boat there?

A. Sixty-four degrees.

Q. If she had kept her course how far off her port bow would she have been? If she had not changed her course how far at the fourth minute would she have been off her bow? How much

117 would she have changed her bearing?

A. Fifty-two degrees.

By Mr. Burlingham:

Q. If you were told and believed that the Alleghany bore from the Pomaron about N. E. and continued to bear from her about N. E. as they approached each other, would this diagram throw any light on the situation as it is drawn?

A. No, sir.

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Q. You have to assume, and did assume, that the bearing was constantly changing?

A. Yes, sir.

Q. Not that it was constant and unchanging?

A. Yes.

Q. You are satisfied yourself by this diagram, and in no other way, I suppose, that there was no possibility of collision between the two vessels if they had kept their respective courses?

A. By this diagram.

Q. You are not a navigator of course?

A. No, sir.

Q. You don't know all the rules of the road or the duties of ships?

A. No.

Q. You don't attempt to pass on that?

A. I don't claim to be an expert on those points.

Q. On what did you base this assumption that the Alleghany changed her course at the precise moment that the Pomaron changed hers?

A. Why, I took that from the statement which was provided me in working out this problem.

Q. Is that involved in the hypothetical question?

A. Yes, sir.

Q. Let me ask you this: On the assumptions on which you base this diagram, would you say that if the Alleghany had kept
118 her course instead of starboarding there would have been no collision, assuming the Pomaron made the change indicated on this curve?

A. I say that.

Q. How would she avoid the Pomaron then, going astern of her?

A. If the Alleghany had kept on her course and at her speed.

Q. Do you mean to say that if the Pomaron had changed her course as you have indicated on the diagram and the Alleghany had made no change, there would have been no collision? What would have happened?

A. The Pomaron would have crossed the Alleghany's bow.

Q. By a wide margin, as you said to his Honor?

A. Yes, sir, by a wide margin.

Q. Not so wide, I suppose, as by starboarding?

A. (After figuring) By about 800 feet, judging, without going into it very accurately; very close to 800 feet; the Pomaron would have been beyond the course of the Alleghany.

Q. She would have gone 800 feet under the stern of the Pomaron?

A. Yes, sir.

Q. I thought you said she would have crossed her bow?

A. The Alleghany would? Oh, no; the Pomaron would have passed across the bow of the Alleghany 800 feet approximately.

Q. If the Alleghany had starboarded of course there would have been no collision, would there?

A. She did starboard, because the collision followed.

Q. I meant if she had ported?

OSE IN CENTER

A. No, of course not.

Q. Aren't you wrong in fixing that estimate of 800 feet? How did you work it out?

A. On the diagram you will see a dotted line following out the original course of the Alleghany S. 3 degrees W. Down near
119 the point of meeting of the two courses I have marked there "1 m.," that means that the Alleghany, had she continued her course, would have been at that position one minute before the actual time of collision, whatever that might be.

Q. And as I look at the diagram I find the "1 m." point for the course of the Pomaron way off to the eastward, so it looks to me as if it was a good deal more than 800 feet. How can you say it is 800 feet?

A. That distance is on the scale very close to 800 feet.

Q. What distance?

A. The distance from the course of the Alleghany to the position of the Pomaron, when the Alleghany would have crossed the course of the Pomaron on that curved course.

Q. Yes; but when the Alleghany's course you have marked straight had crossed the course of the Pomaron the Pomaron would not still be at "1 m.," she would be still further, wouldn't she?

A. She would be at the point marked "1 m."

Q. When?

A. When the Alleghany was at the position also marked "1m."

Q. But their courses are not crossing then. I want the intersection of their courses on your assumption.

A. The intersection of the courses on my assumption?

Q. The intersection of the courses on your assumption that the Alleghany was keeping her course and speed and the Pomaron doing exactly what she did.

A. Exactly that would have occurred about one-half a minute before the collision actually occurred, using that as a time to reckon from, whatever that time is; therefore if you take the position
120 of the Pomaron midway between "0 m." and "1 m.," which is one-half, that will coincide very closely to the position of the Alleghany when the course of the Alleghany crossed the course of the Pomaron, and we can measure that; it looks to be 500 feet.

Q. It looks to me, roughly 1,200 feet.

A. I said 800 feet approximately.

By the Court:

Q. Mr. Burlingham has asked you, first, to project the straight line on the course of the Alleghany until it intersects the curved line.

A. Yes, your Honor.

Q. Just project it.

A. That is projected down here.

Q. You have marked it with an "X"?

A. I have marked it with an "X."

Q. The Pomaron crossed that point at about 2¼ minutes before the collision, did she not?

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A. The Pomaron crossed that point about 2¼ or 2 1-3 minutes before, yes, sir.

Q. If the Alleghany had not changed her course, which she did, she would be therefore about 2¼ minutes up that line?

A. Exactly.

Q. Which would be in that position?

A. Yes, sir.

Q. Is that 800 feet?

A. No, sir, that is not 800 feet. This is 800 feet here.

Q. It is not how far under the stern of the Pomaron she would have passed, but how far off the bows of the Alleghany the Pomaron would have passed.

A. That would be very close to 1,300 feet.

Q. It makes a good deal of difference whether you want to know how far under the stern of the Pomaron she would have
121 passed, or how far off the bows of the Alleghany the Pomaron would have passed?

A. I took the question to mean how far beyond the course of the Alleghany would the Pomaron be at the time when the Alleghany crossed the Pomaron's course.

By Mr. Burlingham:

Q. What is your answer?

A. Thirteen hundred feet. One minute, please. I wish to revise that by the scale. It would be very much more. I will state it two ways: When the Pomaron crossed the course of the Alleghany the Alleghany would be about 2,200 feet from that point, from the point of the intersection of the two courses. Now, one other way.

By the Court:

Q. And under the stern 800 feet?

A. About 1,000; the Pomaron would be about 1,000 feet beyond the course of the Alleghany.

By Mr. Burlingham:

Q. Then it was the starboarding of the Alleghany that brought about the collision, was it?

A. Yes, sir.

Redirect examined by counsel for cargo claimants.

By Mr. Harrington:

Q. In figuring the position of the Alleghany at the point marked "6 m." on her course, did you take into account the hypothesis given you in the main question, that the Alleghany had starboarded
122 at about the same time that the Uomaron had ported?

A. Yes.

Q. And if you had not taken that into account, of you had tried to work back from the point of collision without any starboarding by the Alleghany, would the Alleghany be as far up on this course as she is here shown to be?

OSE IN CENTER

A. No. Pardon me. Further up the course, yes, further up the course—the difference between her curved course and the straight line.

Q. So she would have been further up the course?

A. She would have been further up the course.

Q. And the bearing given in the positions "5 m." would not have been in the hypothetical question?

A. No.

Q. Counsel for the Pomaron asked you, Was the collision caused by the starboarding of the Alleghany. What did you say to that?

The Court: He said it was.

Q. You said it was; what do you mean by that?

A. If the Alleghany had continued on her course and the Pomaron had changed her course as per diagram.

Recross by counsel for the Pomaron.

By Mr. Burlingham:

Q. You think you have demonstrated by this diagram that if both vessels had continued their course and speed there would have been no collision?

A. Yes.

Q. How much clearing space would there have been between them?

123 A. If each maintained its original course and speed at the time when the Pomaron would have crossed the course of the Alleghany there would have been 1,600 feet between them; when the Pomaron crossed the bows of the Alleghany it would have crossed by 1,600 feet.

Q. I thought you said the Alleghany was to cross the Pomaron's bow; that if both vessels maintained their respective courses and speed the Alleghany would have crossed the Pomaron's bow?

A. Assuming there was a N. E. bearing between the two vessels. But I did not assume that in this diagram, I threw that aside as uncertain.

Q. You maintain, do you, that this diagram proves that if the Pomaron and Alleghany had each maintained its course and speed the Pomaron would have crossed the bows of the Alleghany with a clearance of 1,600 feet?

A. Yes.

Mr. Kirlin: That is assuming the five points bearing.

Mr. Harrington: We must all agree to that if it was N. E.

The Witness: There was an uncertainty as to the N. E. bearing.

By the Court:

Q. If you assume the vessels were on the courses indicated and at any time bore northeast from each other, having their respective speeds also indicated, in that case your conclusion is that the Alleghany necessarily would have passed the bows of the Pomaron about 1,600 feet away?

COPY BOUND CLO

A. No, sir.
Q. That is not your conclusion?
A. No, sir, that is not my conclusion.
Q. Are there enough data without that to indicate how
124 she would pass and how far off?
A. No in this diagram. But I can very easily do it.
Q. You haven't done it?
A. No, sir.
Q. On the other hand, you do assume, reckoning back from the point of collision the respective places of the different moments, that had each vessel kept its place the Pomaron would have crossed the bows of the Alleghany about 1,600 feet off?
A. Yes, sir.

The diagram is offered in evidence. It is marked Exhibit 14, January 13, 1913.

Recross by counsel for libellants.

By Mr. Kirlin:

Q. Your diagram is based entirely on the hypothetical question?
A. Yes, sir.
Q. You have been told to diagram a situation?
A. Yes, sir.
Q. Based on a possible bearing of the Alleghany of five points on the port bow of the Pomaron?
A. That is not the way I put it, no, no.
Q. What bearing have you assumed?
A. I have assumed no bearing. I have merely worked back from the point of collision and so I have located the positions of the two vessels at various moments or minutes of time before the collision occurred.

By the Court:

Q. You base your diagram on the fact that two vessels at different points of time meet in collision on courses at that instant three points apart; you have the means of ascertaining at one, two, three, four, five and six minutes theretofore the positions on
125 the courses that the two vessels occupied. You have also, to a certain extent, the means of indicating how they were changing their courses. That is all?
A. That is all.
Q. Now, I want to know how you ascertain the character of the curve which these two vessels—the courses which these two vessels were on prior to the collision. A great deal depends on the character of the curve?
A. The path of the Alleghany when changing her course four minutes preceding the collision?
Q. You ascertained each curve by pre-supposing that the Pomaron first changed her course five minutes prior to the collision and the Alleghany four minutes before it?
A. Yes.

LOSE IN CENTER

Q. And you took those as data in each case?
A. Yes, sir.
Q. Those are the only data which you took to draw the diagram. Is that correct?
A. That is correct.
Q. That is the entire basis?
A. That is the entire basis.

Mr. Kneeland: There is a little more than that. The first officer of the vessel has testified how fast the vessels would run.

The witness: I have taken the speeds as given.

Mr. Kirlin: We offer in evidence a stipulation between the parties dated January 6, 1913, in relation to agreeing that certain statements set forth in the stipulation be received as testimony of the master and chief officer of the Alleghany.

126 The stipulation is marked Exhibit 14*a*, January 13, 1913.

Mr. Kirlin: We rest.

Mr. Burlingham: We offer in evidence the remainder of the depositions taken on June 7, [illegible] six in number, enclosed in a book of 110 pages.

The direct examinati[illegible]d redirect of the officers in charge of the Pomaron are [illegible]urt by the respective counsel.

Mr. Burlingha[illegible]n evidence a stipulation between counsel dated Ja[illegible]15.

It is marked E[illegible]t 15, January 13, 1913.

An extract fro[illegible] a translation of the log of the Alleghany is offered in evidence, together with a stipulation dated January 8, 1913.

They are marked Respondents' Exhibit A, January 13, 1913.

It is stipulated that the value of the ship is $70,500.

127 United States District Court, Southern District of New York

HAMBURG-AMERICAN LINE, Libellant,
against
FURNESS, WITHY & COMPANY, Limited, Respondent.

YANG-TSZE INSURANCE ASSOCIATION, Limited, and others,
against
FURNESS, WITHY & COMPANY, Limited, and HAMBURG-AMERIKANISCHE PACKETFAHRT ACTIEN-GESELLSCHAFT.

Depositions of witnesses for the respondent Furness, Withy & Company, Limited, taken pursuant to notice by consent, at the Warwick Hotel, Newport News, Virginia, on June 7th, 1912.

Appearances:
Messrs. Burlingham, Montgomery & Beecher (Mr. Burlingham and Mr. Leech and Mr. Floyd Hughes), for the Respondent, Furness, Withy & Company, Limited.

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Messrs. Haight, Sandford & Smith (Mr. Smith) for the Hamburg-American Line.

Messrs. Convers & Kirlin (Mr. Kirlin), for the Yang-tsze Insurance Association, Ltd.

128 Messrs. Kneeland, Harison & Hewitt (Mr. Kneeland), for the Federal Insurance Company, and others.

Messrs. Harrington, Bigham & Englar (Mr. Harrington), for the British & Foreign Marine Insurance Company.

Addison S. Pratt, Esq., for the United States District Attorney for the District of New York.

It is stipulated that the testimony may be taken by a stenographer, signing, filing and certification being waived; stenographer's fees to be a taxable disbursement.

It is further stipulated that the evidence to be taken may be used in any suit or proceeding that may be brought by any of the parties hereto, or the parties represented by the persons here present.

JAMES GRIFFITHS, being duly sworn and examined as a witness for the Pomaron, testifies as follows:

By Mr. Burlingham:

Q. How old are you?

A. 33 years of age.

Q. Where do you live?

A. Aberavon, South Wales.

Q. How long have you followed the sea?

A. I have been at sea since I was 14 years of age; I have been at sea 19 years.

Q. How long have you been master?

A. I have been master of that ship 21 months.

129 Q. Is this your first command?

A. My first command, but I have held a master's certificate nine years.

Q. You have been chief officer of other vessels?

A. Yes, in the Furness employ 13 years.

Q. The Pomaron is owned by Furness, Withy & Company?

A. Yes, West Hartlepool.

Q. What is her tonnage?

A. One thousand one hundred and twenty-seven net registered tonnage.

Q. Gross?

A. One thousand eight hundred and twenty-nine; I am not positive on that. (Referring to paper) Gross, 1809.

Q. Give her dimensions?

A. Two hundred and seventy-eight feet long, 40½ beam, 20½ depth of hold; she has triple expansion engines, 1,000 indicated horse-power.

Q. What kind of a propeller?

A. Right-handed propeller.

Q. What is her full speed?

A. Nine knots loaded ship.

LOSE IN CENTER

Q. She is a freight boat?
A. She is a freight boat.
Q. You arrived in Newport News the day before yesterday?
A. Yes, sir.
Q. For coals?
A. Yes, sir.
Q. You are en route for Hamburg?
A. Yes.
Q. From where?
A. From Gulfport.
Q. As soon as these depositions are taken you expect to proceed to Hamburg with this crew and outfit?
A. Yes.
Q. When did this collision happen?
A. This collision happened on the morning of the 2nd of February.
Q. At what hour?
A. Eleven twenty.
Q. What voyage were you on then?
A. On a voyage from Baltimore to Leith.
130 Q. When did you leave Baltimore?
A. The 1st of February at 7 A. M.
Q. Where did the collision take place?
A. One hundred and ten miles outside of Cape Henry; that is by dead reckoning.
Q. What was the latitude and longitude?
A. 37.26 north, 73.42 west, I think it was.
Q. What were you drawing when you left Baltimore?
A. 16.2 forward, 16.3 aft; this was fresh water, in Baltimore.
Q. What difference does that make?
A. About 4½ inches in that ship.
Q. In salt water she would draw so much less?
A. Yes.
Q. What was the cargo?
A. The cargo was grain and general cargo; 2,500 tons of cargo, and we had about 300 tons of bunkers on board.
Q. Coming to the morning of the collision, were you on watch?
A. No, I was asleep previous to being called.
Q. At what time did you go off duty?
A. I was on deck from 7 o'clock in the morning of the first until 5 in the morning of the second, because there was ice in the Chesapeake coming down and it was important for me to be up, and it cleared after 5 o'clock, and the second officer was on the bridge, and I told him I was going to sleep. I said, "Give me a call if it gets thick or dirty," regular orders, and I went aft.
Q. What was the weather then?
A. The weather was clear then, fresh breeze from southwest.
Q. Where are your quarters?
A. Right aft, the after end of the ship.
Q. The ship has an open bridge?

COPY BOUND CLOSE

A. You have to come down a well deck from the bridge
131 amidships down on the well deck, and then up on the poop to go down to my room.

Q. You left the bridge at 5 o'clock?

A. After 5 o'clock in the morning.

Q. Did you come out again before the collision?

A. I woke up at 8 o'clock, and got a cup of tea.

Q. Did you take a look then?

A. Yes; the weather was clear, the sun was shining then and I had a cup of tea and laid back again, and told them to call me before noon to get the position.

Q. Did you go to sleep?

A. Yes, I went to sleep; I had been up about 22 hours previous to that.

Q. What wakened you?

A. The steward came in and woke me up and told me to come on deck immediately, and before I got out of the cabin we had collided with another vessel.

Q. Were you undressed, did you have to dress to go out?

A. I just slipped my trousers on and my coat and slippers and came on deck like that.

Q. Before you got out the collision occurred?

A. Yes, before I got on deck the collision occurred; I felt the vibration of the ship, the engines were going astern before I got out of the cabin; I could feel the vibration of the ship through the engines going astern.

Q. Where is the door from your quarters?

A. You come out into the saloon first and go up some stairs to come up on the poop.

Q. Which way do those stairs lead?

A. Aft; it is a scuttle.

Q. The stairs ascend with a look to the stern of the vessel?

A. Yes, they have a turn.

Q. When you got on the poop deck you ran forward?

A. Yes, hard as I could.

132 Q. On which side of the ship?

A. Port side of the ship.

Q. Is there a fore and aft bridge?

A. I had to go down on the well deck and up on the bridge again.

Q. What was the first you saw of the other vessel?

A. She was a little to leeward of us.

Q. How was the wind?

A. The wind was about west then.

Q. Which was the leeward side?

A. That was to the eastward.

Q. Which side of you was leeward?

A. The port side.

Q. Where was the other vessel?

A. She was about half a mile I should think, about four points on our bow, barely that.

Q. What bow?

SE IN CENTER

A. Port bow.
Q. How were you heading then?
A. Somewhere about south I think, because the wind was abeam, being west.
Q. How far away was the other vessel then?
A. About half a mile away, I think.
Q. Could you see from that distance?
A. I could see the ship.
Q. How she had been hit?
A. I could see some signs in the bulwark on the starboard side abaft the engine room.
Q. Your first attention was to your ship?
A. Yes, I didn't trouble about that as long as she was clear.
Q. What did you do?
A. I got on the bridge and the chief officer was there, and I said how did this happen, and he said it was caused through her not giving way according to the rule of the road, so I ordered the boat swung out to ascertain the damage to my ship.
133 Q. Did you launch a boat?
A. We swung them out.
Q. Swung them out of the davits?
A. Swung them out of the davits.
Q. You did not lower away?
A. Did not lower away; he said the ship is not making any water, and the forepeak is full.
Q. That, of course, is forward of the collision bulkhead?
A. Forward of the collision bulkhead, yes, sir.
Q. Did you make any examination yourself?
A. No, I stopped on the bridge.
Q. You accepted his report?
A. Yes, then I hoisted my signal to the other vessel.
Q. What signal?
A. Asking if he wanted any assistance.
Q. What was the reply?
A. He said, "Do not abandon me."
Q. This was by flags?
A. This was by flags, yes, sir, so I stood by him.
Q. Just turning over your engines?
A. The engine was going astern until—the chief officer stopped the engines after I got on the bridge.
Q. When you got on the bridge were they still going astern?
A. Yes.
Q. Did you order him to stop them, or did he do it of his own volition?
A. He stopped them on his own.
Q. How was the weather then?
A. The weather was clear, the sun was shining at times.
Q. Was there any snow?
A. No indication of snow.
Q. Or rain?
A. No; our decks were dry.

COPY BOUND CLOS

Q. Or hail?
A. No.
Q. Any snow on your deck?
A. No.
134 Q. The sun was shining?
A. Yes, the sun was shining at intervals.
Q. Some clouds?
A. Yes, it was cloudy.
Q. Any difficulty seeing vessels?
A. No, sir, not at all.
Q. At any reasonable distance?
A. No.
Q. How far away could you see a vessel?
A. As far as the horizon.
Q. How was the wind?
A. The wind was about west.
Q. What sort of a breeze?
A. Fresh breeze, four or five, I think, on the Beaufort scale.
Q. Tell what happened from that time?
A. I stood by this ship afterwards, and about noon she went full speed ahead across our bow, steering about west northwest.
Q. How were you pointing then?
A. We were pointing about west of south, and then I followed him full speed.
Q. Any signals between you?
A. No, I didn't give any signals; just followed him up; he told me not to abandon him.
Q. Had you been able in this time to observe what the injuries were?
A. No; I thought he was all right when he started to go ahead, and I followed him up, anyway.
Q. At what distance?
A. As far as I could, he was a faster ship than me; he was leaving me behind, and about 2 o'clock he seemed to be stopping and letting some steam escape, so I went close alongside and stopped my ship, and found he had all his boats in the water and all of the crew in them, so I picked them all up.
Q. Did he have passengers?
A. Three passengers; there were 52 all told.
135 Q. Including three passengers?
A. Including three passengers.
Q. Did you use your own boats?
A. No; we had our own boats swung out already.
Q. His came alongside?
A. Yes.
Q. And you took them all on board?
A. Yes, and after we got them on board I asked the other captain if we could see anything else, and he said, "No, it is impossible to board her again, because the water is up to the after decks; the after decks are awash."
Q. This steamship was the Hamburg-American Line Alleghany?
A. Yes.

OSE IN CENTER

Q. When did you first learn her name?
A. It was the mate told me her name; he said it would be only risking life to send anybody aboard there.
Q. Their captain or officer?
A. The captain; he came on the bridge to me and thanked me for saving them.
Q. What became of the Alleghany?
A. We stood by to see what was going to be done, and she sank at about 3:20 P. M.
Q. You proceeded to Newport News?
A. Yes, she went down stern first, and we proceeded in to Newport News.
Q. When did you arrive there?
A. About 6 o'clock the next morning.
Q. What was the nature of the injuries which the Pomaron sustained?
A. Her bow was all knocked to one side, from the port side to starboard, and the stem was broken in five places, but we didn't find that out until we got to the dry dock; and the port anchor was gone.
Q. Was that a patent anchor?
A. A patent anchor.
136 Q. How was it; in the hawspipe?
A. Right up in the hawspipe as we generally carry it.
Q. That was carried away?
A. Yes, the anchor was gone; had a big hole in the bow, and the stem was broken, the injury was below and above the water line.
Q. Can you tell what the direction of the blow on your stem was; did she twist or bend one way or the other?
A. From port side to starboard; our stem was over to the starboard side.
Q. Did you make a drawing of it at the time?
A. Yes, I have it.
Q. When did you make this?
A. This was after the stem was taken out in the dry dock.
Q. Where?
A. Newport News.
Q. Is this your own?
A. Yes.
Q. Did you measure these measurements?
A. Yes.
Q. Explain the diagram to us so it can be put on the record?
A. I could not explain better than it is here; looking end on to the ship the stem was taken over that side; that is the deck line there (indicating).
Q. The heavy vertical line represents the original position?
A. Yes.
Q. And the broken line represents what?
A. As she was over.
Q. Those measurements are what, in feet and inches?

COPY BOUND CLOS

A. I forgot what scale I put it; this is about 21 feet 2 of the stem anyway (indicating), at any rate it is drawn to scale.

Mr. Burlingham: I offer the drawing in evidence.
It is marked "Pomaron Exhibit 1 of June 7, 1912."

137 Q. Here are some photographs, are these correct photographs of the vessel; do they represent the Pomaron after the accident?
A. Yes.
Q. Take this one first; where was that taken?
A. Taken in the stream here, I expect.
Q. That shows the bend of the stem?
A. Yes.

It is offered in evidence and marked "Pomaron Exhibit 2 of June 7, 1912."

Q. (Handing witness photograph.) And this also is correct?
A. Yes.
Q. Taken here?
A. Yes.

It is offered in evidence and marked "Pomaron Exhibit 3 of June 7, 1912."

Q. (Handing witness photograph.) And this one shows where the anchor was carried away?
A. Yes; they all show the anchor.

The photograph is offered in evidence and marked "Pomaron Exhibit 4 of June 7, 1912."

Q. (Handing witness picture.) And this one shows what?
A. That is from the starboard bow.

It is offered in evidence and marked "Pomaron Exhibit 5 of June 7, 1912."

Q. And this one, too?
A. Yes.

The above pictures are offered in evidence and marked "Pomaron Exhibit 6, of June 7, 1912."

138 Cross-examination by Mr. Kirlin:

Q. When and where was the ship built?
A. Built in Grangemouth.
Q. By whom?
A. Grangemouth & Greenock Dry Dock Company.
Q. When?
A. She was four years old last October.
Q. What general condition was she in before this accident?
A. Very good condition.
Q. Passed at Lloyds?
A. She is in the British Corporation.

CLOSE IN CENTER

Q. What classification?
A. A-1, I expect.
Q. The highest classification?
A. Yes, that is the highest.
Q. What did the steward say to you when he came to your room?
A. He said, "Get up quick, sir, you are wanted on deck."
Q. Is that all he said?
A. He said, "There is going to be a collision."
Q. Had you heard anything before that?
A. No, I had not heard anything.
Q. Were you in your bed at the time?
A. I was asleep, yes, sir.
Q. What was the next thing that you noticed?
A. I jumped out and ran out of the cabin as soon as I could, but before I got out of the cabin we had collided.
Q. Before you got dressed?
A. Before I got out of the saloon.
Q. When did you notice the reversing of the engines?
A. I felt the reversing of the engines; I was right above the propeller asleep; the vibration of the ship.
Q. When did you feel that?
A. As soon as I jumped out of bed.
139 Q. Did you hear any whistles?
A. No.
Q. Can you hear the whistle in your room if it is blown?
A. I could if I was awake.
Q. No whistles blown on your ship after you were awakened?
A. No.
Q. How soon did you feel the shock of the bump?
A. A few seconds after I jumped out.
Q. About the time you felt the reversing?
A. As soon as I woke I felt the reversing.
Q. It was only a matter of a few seconds until the collision?
A. Yes, sir.
Q. Did you hear any whistles from the other vessel?
A. No.
Q. You immediately ran up on deck and on the bridge?
A. Yes.
Q. Where is the steering done from?
A. The helmsman is on the upper bridge.
Q. Did you notice how the helm was?
A. The helm was hard-a-port.
Q. Hard-a-port?
A. Yes.
Q. Did the officer say anything about the helm?
A. I never heard him say anything about the helm; I asked how this happened and he said it was caused through the other ship not complying with the rules of the road.
Q. Not giving way?
A. Yes.

COPY BOUND CLOSE

Q. What was it he said; what did you say, what were your words?
A. I said, "How did this happen?"
Q. Is that all you said?
A. Yes; he said it was caused through him not giving way under the rule of the road, I think were the words.
Q. Did he say what rule of the road?
A. No.
Q. Did you know at the time from the position of the vessel what the rule was he claimed had been infringed?
A. No, I couldn't tell exactly then.
140 Q. Where was the other boat then?
A. Away on our port bow, to leeward of us.
Q. How was your ship heading?
A. Somewhere about south, I think; I didn't look at the compass right away.
Q. What was the course when you left the deck in the morning?
A. East by north was my course by compass.
Q. What was your true course?
A. Magnetic course east by north quarter north; she had three degrees deviation, three degrees westerly.
Q. Was the engine still backing when you got on the bridge?
A. Yes.
Q. You judged the direction of the ship's head by the wind?
A. Yes.
Q. Which direction was the wind?
A. The wind was west.
Q. How was it coming over the ship?
A. It was coming from starboard to port.
Q. You said the wind when you went to bed was southwest?
A. Yes; when I got on deck it was west.
Q. You found that out afterwards?
A. Yes.
Q. I am trying to find out what it was that makes you think the ship was heading south when you got on the bridge?
A. Afterwards I found the wind was west, the wind was right at right angles to us and I thought we were heading about south.
Q. Did you look at the compass at all?
A. Not then; I wanted to see if we were clear of that other ship.
Q. How far away was the other ship?
A. About half a mile, I think.
Q. Was she backing?
A. I couldn't say that.
Q. She was over on your port bow about four points, half a mile off?
A. Yes, sir, about that.
141 Q. How did she get away half a mile from you in the few seconds you were occupied getting up on the bridge?
A. I don't know how she got there; that is about the distance I should think she was off.
Q. How long was this after you felt the shock of collision that you got on the bridge?

OSE IN CENTER

A. It would not be very long.
Q. A matter of seconds or minutes?
A. It would be only a matter of seconds; say a minute away.
Q. From the time you were called until you were on the bridge?
A. Yes, I don't expect it would take much longer.
Q. It is quite evident the boats could not have been half a mile apart at that time, isn't it?
A. I am only just estimating.
Q. She seemed an appreciable distance away?
A. She seemed to be half a mile I should say.
Q. Did you look at the compass shortly afterwards?
A. It was a few minutes before I looked at the compass.
Q. The ship's head swung somewhat?
A. Yes.
Q. Was she swinging under the port helm when you got on the bridge?
A. We were swinging under the port helm, yes, sir, and the reversing engines would cause her to go, too.
Q. Did the officer say anything to you as to how long this vessel had been in sight?
A. No, sir, not then, because I sent him down to get the boats out and sound the ship afterwards.
Q. He reported the circumstances to you more in detail later?
A. Yes.
Q. Did he say whether it had been snowing during the morning?
A. He said it had been clear all the morning; he said he had seen her a long time before it collided.
142 Q. Did he tell you how she had been heading?
A. Our ship?
Q. The other ship?
A. He said she had been going about south.
Q. You had been approaching within a point of right angles according to the report he gave you?
A. Something about that, yes, sir.
Q. Did he report to you whether the other vessel had sounded any signals, or whether he had sounded any?
A. That was afterwards when we were discussing; he said the other vessel gave two blasts and there was nothing for him to do but to reverse his engines.
Q. Did he tell you whether he had given any blasts?
A. He said he gave one blast and ported a little.
Q. Did he say when that was?
A. He said that was before he gave the two blasts.
Q. How long was that before the collision; did he say?
A. I forgot how long it was now; he did tell me but I forgot how many minutes now exactly.
Q. Try and recall it.
A. I forget now; about three or four minutes I think he said.
Q. Did he say how far the vessels were apart when he blew one blast and ported a little on the Pomaron?
A. He said about a mile I think off.

COPY BOUND CLOSE

Q. Did he say how far the other ship was away when she blew the two signals?

A. No, I don't remember; he didn't tell me that.

Q. Did he say how long it was after he had blown one whistle that the other ship blew two?

A. Yes, he said it wasn't long after he blew the one blast that she gave the two blasts, and he immediately reversed, he said, seeing he was going to cross her bow.

143 Q. Your ship reversed?

A. Yes.

Q. Did he say whether he had starboarded the helm at any time before the collision?

A. No.

Q. I mean your mate?

A. The Pomaron never starboarded, he said.

Q. Did he tell you?

A. Yes, he told me we never starboarded.

Q. He said you did not starboard?

A. Yes.

Q. But he had ported?

A. Yes.

Q. Did he port again when he got the two blasts from the Alleghany?

A. He put the engines full speed astern, and I believe he put the helm hard over to port.

Q. It must have been so because you found it hard-a-port?

A. It was hard over when I went on the bridge.

Q. Did he say how much he ported the first time?

A. He said he ported a little.

Q. Those were his words?

A. Yes.

Q. Had he left the helm to port from the time he blew the one blast until he subsequently put it hard-a-port?

A. I don't know that.

Q. Did he tell you that?

A. No, he didn't tell me that; I know I found it hard over when I got on the bridge.

Q. You made some report of this disaster?

A. Yes.

Q. Have you got a copy of your report?

A. I only made a report to the Board of Trade in England.

Q. Didn't you make a report to your agent or your owners, a report of the accident?

A. Yes, I wrote home to my owners.

Q. Have you a copy of your report?

A. I don't think I have.

Q. Did you make any entry about it in your official log book?

A. Yes.

144 Q. Have you a copy of that by you?

A. I have a copy of that; it is on board the ship though.

Mr. Burlingham: I think I have a copy of the official log book.

LOSE IN CENTER

Q. You have that on board, have you?
A. No; my official log book is delivered up at Leith; the voyage finishes and our Board of Trade requires us to hand up the official log book.

Mr. Kirlin: I call for the production of the captain's report of the accident to the owners.
Mr. Burlingham: We decline to produce it; we have not it, and there is no reason why we should produce.
Mr. Kirlin: I call for a copy of the report to the Board of Trade.
Mr. Burlingham: I have not a copy of that.

Q. Have you a copy of your report to the Board of Trade?
A. No, I have not got that.
Q. You make a separate report to the Board of Trade besides the report you make in your official log?
A. Yes.
Q. That is what I want.

Mr. Kirlin: I ask that a copy be obtained and produced. I ask for the production of a copy of the entry made in the official log book.
Mr. Burlingham: I have that here and produce it.

145 Q. (Handing witness paper.) Is this a copy of the entry in your log book (handing witness document which Mr. Burlingham produces)?
A. Yes.
Q. The only part of this report contained in your log relating to the collision is, "Latitude 37.26 north, longitude 73.42 west, eGrman steamer Alleghany collided with us, her starboard side abaft the bridge deck coming in contact with our port bow"; is that right?
A. Yes.
Q. Is that in compliance with your obligation to make a report of the facts and circumstances connected with the collision?
A. That is all our Board of Trade requires; we were to make a deposition afterwards to them—a sworn statement.
Q. That deposition is the report you have already referred to?
A. Yes; that is just the official log account of how everything happened.
The above paper is offered in evidence and marked "Yangste Exhibit A of June 7, 1912."
It is as follows:

"Abstract of official log, February 2nd, 1912. Lat. 37. degrees 26 minutes N, Long. 73 degrees 42 minutes W.
"German steamer Alleghany collided with us, her starboard side abaft the bridge deck coming in contact with our port bow. After ascertaining the extent of our damage and finding no water making into the holds, but forepeak "full up to sea level, we hoisted signals asking the Alleghany if she required any assistance and she replied 'Not to abandon her,' so we stood by.

COPY BOUND CLOS

"Soon after the Alleghany went ahead full speed steering W, N W and we followed full speed. About 2 P. M. she stopped
146 and when we got up close to her found the passengers and crew had all taken to the boats, so we picked them up 51 persons all told.

"The master of the Alleghany was asked if it was possible to save anything else but he replied it would not be safe to board her again as the water was up to the after deck when they left her. We stood by close and at 3:20 P. M. the Alleghany sank astern first and then we proceeded to Newport News. The Alleghany belonged to Hamburg and was bound from New York to Haiti, this was told us by the master of the Alleghany. I, the master of the Pomaron gave the master of the Alleghany full particulars of our voyage, ship's name and port of registry.

JAS. GRIFFITHS, *Master,*
W. A. WESTGARTH,
First Mate."

Q. Have you got the officer's log or a copy of the entry in it?
A. The chief officer has a copy of it.
Q. You have not compared this document with the log book; I understand the original log book is not here?
A. No.
Q. Where is it?
A. It is with our owners; we delivered the log book at the end of each voyage.

Mr. Kirlin: I ask for the production of the original log.
Mr. Burlingham: We will send for it.

Q. Have you a scrap log?
A. I asked the chief officer for the scrap log after we arrived at the dry dock and he said "I have not been able to find it since we have arrived here, and it can't be found."
147 Q. That is unfortunate; when did you see it last?
A. The day after the Alleghany's crew left the ship; it was missed; he said he could not find it anywhere, he looked high and low.
Q. Do you think they got it?
A. I don't know, but I would like to get it.

Mr. Kirlin: I call upon counsel for both steamship companies to produce that log.

Q. The captain of the Alleghany came on the bridge of your vessel after the accident?
A. Yes.
Q. Did you have any talk with him about the circumstances of the accident?
A. No.
Q. Did you have any talk with the navigating officer of the Alleghany on the subject?
A. No.

CLOSE IN CENTER

Q. Wasn't it mentioned between you and any of the officers of the other ship?

A. No, I said, "Make yourselves comfortable; I have to go into Newport News"; I said, "there is a saloon and all my berths there for you"; it was cold weather, you know; we spoke the Sabine, one of the Mallory Line; I put up the signal to him saying I had something important to communicate to him so he stopped and came alongside, and I told him we had collided with the Alleghany and she had sunk, and we had the crew and passengers.

Q. He did not get close enough to get the scrap log?

A. No.

Q. Did you have a wireless?

A. No, sir; that is the reason I stopped the Sabine; she had wireless; the revenue cutter, when we got down towards Hog Island, this revenue cutter, the Onondaga, came out and asked if we were all right, and I said, "We are holding out well"; it was blowing strong then; he said, "You don't want assistance"; and I
148 said, "No, I think we will get inside the Capes all right"; he said, "Anyway I will stand by you until you get inside the Capes", so we had her alongside of us steaming all along.

Cross-examination by Mr. Harrington:

Q. I understand when you wakened you jumped right up?

A. Yes.

Q. You hustled to get out as quickly as you could?

A. I should think so.

Q. And before you were able to get your clothes on you felt the crash of collision?

A. No, I had got my trousers on.

Q. It was just a matter of a few seconds from the time you were called until the vessels were in actual collision?

A. Yes.

Cross-examination by Mr. Kneeland:

Q. Have you ever had occasion to put the Pomaron's helm hard-a-port and reverse her engines when she was about in the same trim?

A. No, I don't think going full astern.

Q. Do you know how long it would take her under those circumstances to change her course four points?

A. Well, it wouldn't take very long.

Q. That is very indefinite; how long would it take her with her wheel put hard over and her engines reversed to change her heading four points to starboard?

A. It would take over a minute.

Q. And to change eight points?

A. Once she starts swinging she will come quick; I have never timed her.

Q. The first change is slower?

A. The first change is slower; of course, it takes a certain time to put the helm over.

COPY BOUND CLO

149 Q. You have never had an opportunity to test how long it would take to change the course eight points?
A. No, sir, I have never timed her.

By Mr. Kirlin:

Q. Does she answer her helm readily?
A. Yes, she is pretty quick on the helm.

By Mr. Kneeland:

Q. Does she steer by steam?
A. Yes.
Q. Who was at the helm?
A. Hyslop.
Q. Is he here?
A. Yes.

By Mr. Kirlin:

Q. Have you ever noticed how long it takes to stop the ship by reversing her engines from full speed ahead?
A. It would take a good while to stop the ship dead.
Q. How many lengths do you think she would travel before she stopped?
A. I reckon it would take about five minutes to stop her dead.
Q. She was not stopped at the time of the collision?
A. No, I believe she was going a little ahead when they collided.

Cross-examination by Mr. Smith:

Q. I understood you to tell Mr. Kirlin that you had got out into the saloon at the time?
A. Yes, you see my room is off the saloon; the saloon is in the middle of the poop and my room is on the starboard side of the entrance, the room is on the starboard side.
Q. Do you recollect whether you had got in the saloon or
150 whether you were still in your room when the impact took place?
A. I was in the saloon.
Q. You are sure of that?
A. Yes, I was putting my coat on.
Q. I suppose even if you had not fully stopped when you struck the Alleghany that impact would probably cause you to come about dead in the water?
A. It would wheel you around at the angle she hit us, I think, help to swing her around.

Redirect examination by Mr. Burlingham:

Q. The place where she sank was how far from the place the collision occurred?
A. I reckon about 18 or 19 miles.
Q. Did you work out that position by dead reckoning or by observation?

LOSE IN CENTER

A. I got the place where she sank, I got the chief officer to take an observation by the sun; that observation is correct.

Q. Do you recall what it is?

A. Yes, 37.33 north; 74.4 west; of course, the other is dead reckoning; we had no time then to get sights.

Q. What time did you pass Cape Charles?

A. Cape Charles light vessel?

Q. Yes?

A. About twenty minutes of two, I think.

Q. I mean Cape Henry?

A. Cape Henry, we discharged the pilot at half past twelve.

Q. You said this collision was about 110 miles by dead reckoning from which Cape?

A. Cape Henry; that is where we discharged the pilot, just off Cape Henry.

Q. Have you plotted that out on the chart?

A. The position?

Q. Yes.

A. Yes, we got the position, but it is a very small scale
151 chart; we were going home; we were clear of everything then.

Q. How many hours did it take you to make that 110 miles?

A. I gave her over nine knots, I think.

Q. I don't mean in plotting it, but if you passed Cape Henry at half past twelve—the collision occurred about 11:20—that is nearly 11 hours?

A. Yes.

Q. And 110 miles in 11 hours would make 10 miles an hour?

A. Yes.

Q. But you told us your top speed was 9 miles an hour; I wish you would explain that?

A. I was allowing for the wind being aft and we got into the stream then.

Q. You were aided both by the wind and Gulf Stream?

A. Yes; we had not been long in the Gulf Stream; we had the other stream with us on the inside.

Q. In answer to Mr. Kirlin, you have given a great deal of conversation which you had with your chief officer about the collision and you say he told you that he ported a little?

A. Yes.

Q. Did he tell you why he ported?

A. No, he didn't tell me why.

WILLIAM ARMSTRONG WESTGARTH, being duly sworn and examined as a witness for the Pomaron, testifies as follows:

By Mr. Burlingham:

Q. Are you the chief officer of the Pomaron?

A. Yes.

Q. How long have you been?

A. About two years and six months up to now.
152 Q. Chief officer all that time?
A. Yes, sir.
Q. What certificate do you hold?
A. Master's.
Q. How long have you held it?
A. Close on three years now.
Q. How long have you been going to sea?
A. About 13 or 14 years.
Q. In steam always?
A. Excepting the first three years.
Q. The first three years in sail?
A. On the training ship; she was a sailing ship.
Q. How old are you?
A. 26.
Q. Have you been on other steamers as an Officer?
A. Yes.
Q. In what capacity?
A. Second and third.
Q. In the employ of Furness, Withy & Company?
A. About 7 years I have been with Furness, Withy.
Q. What other?
A. Twelve months with Ropner of West Hartlepool, and previous to that I was with T. & J. Harrison at Liverpool.
Q. Were you in charge of the navigation of the vessel at the time of the collision with the Alleghany, February 2nd last?
A. Yes.
Q. When did you go on watch that morning?
A. About half past eight.
Q. Relieving whom?
A. The second mate.
Q. Did you go on the bridge then?
A. Yes.
Q. Did you remain on the bridge until after the collision?
A. Yes.
Q. Did you leave it at all?
A. For about five minutes when I took the bearings of the sun, about a quarter of an hour after I went on the bridge; I was only away about five minutes.
Q. How far from the bridge is the stem?
A. About 50 feet.
Q. Who was on the bridge with you?
A. New man was at the wheel.
153 Q. When did he come on?
A. Eight o'clock.
Q. How long did he remain at the wheel?
A. Until 10 o'clock.
Q. He was relieved by whom?
A. Hyslop, the apprentice.
Q. He is an apprentice?
A. Yes.

Q. Has he any rank?
A. He is on the articles as an apprentice.
Q. Where is the wheel?
A. On the upper bridge.
Q. Is it in a house?
A. No.
Q. On an open bridge?
A. Yes.
Q. Is there any clock on the bridge?
A. No, sir.
Q. What was the weather when you went on watch at 8:30?
A. Moderate breeze.
Q. From what direction?
A. About west—northwest, moderate sea.
Q. How was the weather?
A. Cloudy but fine and clear.
Q. Was there any snow or rain or hail or mist?
A. No.
Q. Any difficulty about seeing objects?
A. No.
Q. During your watch did you see any vessels except the Alleghany?
A. No.
Q. About when did you first sight the steamship Alleghany?
A. A little after half past ten.
Q. Where away?
A. Ten or 12 miles away then.
Q. On which hand?
A. On the port side, port bow.
Q. How many points?
A. Four or five points off on the bow.
Q. Did you take a look at her with the glass?
A. Yes.
Q. Did you make out what general direction she was coming?
A. Yes, about southward at the time I saw her.
154 Q. What was your course?
A. East by north compass.
Q. That is your compass course?
A. Yes.
Q. Is there any deviation or variation?
A. Quarter of a point west; east by north quarter north is the magnetic course.
Q. What speed were you going at?
A. About 9 knots an hour.
Q. Were the engines full speed?
A. Yes.
Q. You have an indicator or dial?
A. Yes.
Q. Which registered full speed, did it?
A. Yes.
Q. How long had you been on this course, east by north?

A. Since we got outside Cape Henry, after we got clear the course was set.
Q. During your entire watch were you on that course?
A. Yes, sir.
Q. At same speed?
A. Yes, sir, same speed.
Q. How do you judge you were making 9 knots?
A. That is about the average speed.
Q. Of course the vessels were on crossing courses and approaching each other?
A. Yes.
Q. Was she going any faster than you?
A. Yes, sir, considerably faster than us.
Q. Tell us what happened from that time on?
A. From the time I first saw the Alleghany?
Q. Yes.
A. I was watching pretty closely while he was coming up, and I saw his bearing was not changing at all; all the time he was closing in on us, but getting pretty well in view all the time until he was about a mile away, and I thought he was getting pretty close and it was time for him to do something.
Q. Did you take a look with your glass?
A. Yes.
Q. Did you make out men on the bridge?
A. I could see no one on the bridge at all.
155 Q. Had she a wheel house on the bridge?
A. Yes, and she had dodgers up.
Q. A wind shield?
A. Yes.
Q. Which side of the bridge was this wind shield?
A. Starboard side.
Q. You saw nobody?
A. Nobody on the bridge at all.
Q. They were getting pretty close?
A. Yes.
Q. As close as a mile?
A. Yes, so I thought I would give him a blast on the whistle.
Q. What for?
A. To attract his attention.
Q. Wake him up?
A. Wake him up a bit, and I also ordered the helmsman to port a little.
Q. Did he obey that order?
A. Yes.
Q. How much did he port?
A. She went off the course about a point; went off to about east.
Q. Why did you port?
A. I had to give him a little more clearance; I expected him to come under my stern all the time, and they were getting too close as I thought to be safe.

Q. Did you think there was any danger then?
A. Yes.
Q. What was the danger?
A. I saw if he was going to keep on the way he was doing he would catch us somewhere about the engine room.
Q. If you had maintained your course he would have struck you near the engine room?
A. Yes, about midships.
Q. Was there any indication he was changing his course at all then?
A. No, none at all.
Q. And the effect of porting your helm would be to give him more room?
A. Yes; by us porting like that it would get us further away he would not catch us in the engine room, if he had not altered his course at all.
156 Q. If you had both maintained the courses you were on then without change, what do you think would have happened?
A. He would have run right into us amidships.
Q. Are you sure of that?
A. Yes.
Q. Would not he have got across your bow?
A. No, sir, could not have done it.
Q. Could you have possibly have got across his bow?
A. No.
Q. He was going faster than you were?
A. He was going faster than we were.
Q. What was the result of this blast of yours to wake him up?
A. About a minute or so after I gave him the blast he answered and gave me two blasts.
Q. You knew what that meant?
A. Yes.
Q. What did it mean?
A. That he was going to cross ahead of me.
Q. What did you do?
A. I rang the engine full speed astern as soon as he gave me two blasts, and reversed the engine.
Q. Did you make any signal when you did that?
A. No.
Q. Put your engines full speed astern?
A. Yes.
Q. Did you do anything to your wheel?
A. Put it hard-a-port.
Q. She has a right-handed propeller?
A. Yes.
Q. When she backs her stern swings which way?
A. To starboard.
Q. And the porting of your helm also helped that?
A. Yes.
Q. Your object was to escape him if possible.

A. Yes.
Q. Now, did you take the time of these things?
A. No, sir, there was no clock there.
Q. Did you look at your watch?
A. I had no watch with me.
157 Q. Did you check your way by this order to the engines?
A. Yes.
Q. Was the order obeyed?
A. Yes.
Q. Did the signal come back on the dial?
A. Yes, sir, at once.
Q. What happened?
A. After I had rung full speed astern I saw the Alleghany—she was getting probably half a mile or a little less—she put her helm hard-a-starboard and I could see she was swinging around, her stern was flying into us and of course when he put his helm hard-a-starboard his stern swung around and caught us on the bow, about abreast of No. 3 hatch.
Q. Where did you come together?
A. At an angle of about 45 degrees I should think, our port bow struck him just in the wake of No. 3 hatch.
Q. Abaft the engine room.
A. Abaft the engine room.
Q. Had you way on at the time?
A. Very little at the time we struck him.
Q. How long do you think it was from the time you reversed the engines until the two vessels came together?
A. About four minutes.
Q. How long do you think it was from the time you blew your one blast until you gave the order to reverse?
A. It would be less than a minute, somewhere about a minute; probably less.
Q. As I understand you you blew one blast and ported your helm a little, and in half a minute or so the other vessel replied with two blasts, and you instantly reversed your engines?
A. Yes.
Q. Did you put them at stop and then full speed astern?
A. No, put the indicator right over.
Q. Without stopping?
A. Yes.
Q. What sort of a blow was it, a hard blow?
A. The wind——
158 Q. No, was it a hard blow of collision?
A. We didn't feel the shock very much; it was a pretty hard blow.
Q. Did the Alleghany stop her engines?
A. No.
Q. How do you know?
A. I could see the propeller as she was going past us.
Q. Did she go past you?

A. Yes, when we struck him the Alleghany heeled over and I could see——

Q. Heeled over to port?

A. Yes, and he slid right across our bow, and after he got past the bow his propeller was going ahead.

Q. You could see his propeller in forward motion?

A. Yes.

Q. How far did he go before he stopped his way?

A. I suppose about a mile or a mile and a half before we were both stopped because we were going astern and we kept going astern for a few minutes after.

Q. You say you saw the propeller?

A. Yes.

Q. Could you see the rudder?

A. Yes.

Q. What helm was she under when she went by you?

A. Starboard helm at the time.

Q. How much to starboard?

A. Hard to starboard.

Q. Could you see it by the rudder?

A. Couldn't make it exactly out, whether it was really hard over, but you could see it was well over, but you couldn't see whether it was jammed up or not.

Q. How was the weather at the time of the collision?

A. Fine and clear.

Q. Did you ever hear anybody say that it was snowing at the time?

A. Not of our crew.

Q. From these others?

A. After they got aboard in the afternoon, Saturday afternoon. when I first heard any mention about any snow storm.

159 Q. Who did you hear speaking of it?

A. The chief officer of the Alleghany.

Q. Where?

A. We were all in the engineer's mess room at the time.

Q. On the Pomaron?

A. Yes, sir, having dinner.

Q. Where was the ship?

A. In Newport News; this was on Saturday in Newport News and the chief officer brought me in a paper and pointed out an account of the collision in a Newport News paper, and at the part where it said the collision occurred in a blinding snowstorm, and pointed it out to me and said, "It is all right, remember this"; that is the first thing I heard of it.

Q. Did you say anything to him?

A. No.

Q. Is that the first you ever heard about snow?

A. Yes.

Q. As a matter of fact was it perfectly clear?

A. Perfectly clear.

Q. Had there been any snow during your watch?

A. No.
Q. Was there any snow afterwards?
A. We had a very little, just a little flurry about half-past 2 or 3 in the afternoon.
Q. On the passage in from the place of collision to Newport News what was the weather generally?
A. Strong wind from the west; it was freshening up, and a rough sea getting up.
Q. How about the weather itself?
A. The weather was fine and clear.
Q. All the way in?
A. Yes.
Q. (Handing witness paper.) I show you an extract from a Newport News paper; is this what you refer to "Due to a blinding snow storm and heavy sea, considerable time was taken to transfer the passengers"; is that what you refer to?
A. Yes.
160 Q. Was there any truth in that?
A. None at all.
Q. Did you keep the ship's log?
A. Yes.
Q. Make the entries yourself?
A. Yes.
Q. Are they transcribed from a scrap log?
A. Yes.
Q. Is that scrap log a book or a slate?
A. It is a book.
Q. Where was that kept on the Pomaron?
A. In the wheelhouse.
Q. The scrap log?
A. Yes.
Q. Did the officer on watch make the entries?
A. Yes.
Q. Did you make any entries with regard to this collision?
A. Yes.
Q. In the scrap log?
A. Yes.
Q. Where is the scrap log?
A. I don't know I am sure where that one is; the one we were using at the time I had made the entry and when I came to look for it two or three days after I couldn't find it.
Q. You had made an entry?
A. Yes.
Q. When did you make the entry?
A. About 1 o'clock, half-past one in the afternoon I made part of it and the remainder I put up in the dog watch at night, 7 o'clock.
Q. What was the last you saw of the scrap log?
A. I wrote it up Saturday up to the time of arriving at Newport News and left it in the chart room, and when I came to look for it afterwards I couldn't find any trace of it.

Q. Did you make a thorough search for it?
A. Yes, looked everywhere for it that it could possibly be put.
Q. Have you ever seen it since?
A. No.
161 Q. Did you transcribe the entries from that into the log?
A. Yes.
Q. Where is the ship's log?
A. I don't know; it was left at England this time.
Q. Have you a copy of that log?
A. Yes.
Q. Did you make it yourself?
A. Yes.
Q. When?
A. Two or three days after we arrived in Newport News while we were on the drydock.
Q. What did you do it for?
A. More for my own convenience than anything.
Q. Have you it there?
A. Yes.
Q. Is that the very paper which you wrote at that time?
A. Yes.
Q. Is that a true copy?
A. Yes.
Q. Of the entries as they appear in the ship's log?
A. Yes.
Q. Which you say is with the owners?
A. Yes.

Mr. Burlingham: I think it is much more convenient to produce it now so you can cross-examine about it rather than wait for the log book.

Mr. Kirlin: We will take it subject to production of the original.

Q. This is in your handwriting?
A. Yes.

It is marked for identification "Pomaron Exhibit 7." It is as follows:

"Friday, Feb. 2nd.

0.10 a. m. Tail of Horse Shoe Lt. Vl. abm.
0.20 a. m. Half speed.
0.25 a. m. C. Henry Lt. abm.
0.30 a. m. Engines slow.

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0.38 Stopped to discharge pilot.
0.50 a. m. Full speed ahead.
1.40 a. m. C. Charles Lt. Vl. abm.
Mod. wind smooth sea, fine & clear.
7.20 a. m. Wind hauls W. with heavy rain squall.
8.0 a. m. Mod. wind & sea cloudy but clear weather.
10.35 a. m. Sighted steamer on Port bow steering to southward.
Bearing about N. E.

11.14 a. m. Steamer getting close, keeping his course & speed, so in order to try and avoid collision I gave 1 (one) blast of whistle and altered my course to starboard. Other steamer answered by 2 (two) blasts.
11.17 a. m. Stop & full speed astern.
11.21 a. m. Collided with ss. Alleghany my port bow striking him abaft the bridge deck on starboard side.
11.26 a. m. Clear of steamer. Stopped engines. Captain gave orders sound ship ascertain damage & swing out life boats. Found holds making no water but forepeak full up to sea level. Signalled other ship asking him if he required assistance. He replied, not to abandon him, so we stood by.
0.10 p. m. SS. Alleghany proceeded towards shore so we followed him full speed. Steering W. N. W. magnetic. SS. Alleghany stopped & was sinking aft and crew taking to life boats.
2.5 p. m. Stopped engines close to steamer. Engines used as required in picking up crew out of boats.

163

2.40 p. m. All crew & passengers on board. Stood by SS. Alleghany until she sunk stern first at 3.20 p. m.
3.25 p. m. Proceeded full speed ahead back for Newport News.
4.50 p. m. Stopped to ask SS. Sabine to report by wireless the above collision & report steamer sunk & all hands safe on board this steamer & proceeding to Newport News.
5.5 p. m. Full speed ahead."

The Witness: It is a true copy, but I did not take the courses which were on the other page; it is on the same page, but on the left-hand side.

By Mr. Kirlin:

Q. Is this paper which you have produced which you say is a copy of the log a copy of the slate log or a copy of the log which was finally written up?

A. A copy of the log; it might not be word for word; it is just for my own use that I really took it.

The typewritten copy of the log is marked "Pomaron Exhibit 8 for identification of June 7, 1912," and is as follows:

"Log of the S/S. Pomaron from Baltimore Towards Leith, Friday, February 2nd, 1912.

12.10 a. m. Tail of Horse Shoe Lt. Vl. abeam.
12.20 a. m. Half speed.
12.25 a. m. Cape Henry Light abeam.
12.30 a. m. Engine slow.
12.38 a. m. Stopped to discharge pilot.

15.50 a. m. Full speed ahead, set course E. x N.
1.40 a. m. Cape Charles Light abeam, Moderate wind, Smooth sea, fine and clear.

164

7.20 a. m. Wind hauls West with heavy rain squall.
8.0 a. m. Moderate wind and sea; fine clear weather.
10.35 a. m. Sighted steamer on port bow steering to southward, bearing about northeast.
11.14 a. m. Steamer getting close and keeping his course and speed, so in order to try and avoid collision I gave one blast of whistle and altered my course to starboard, other steamer answered by two blasts on whistle.
11.17 a. m. Stop and full speed astern.
11.21 a. m. Collided with steamer Alleghany port bow striking him abaft bridge deck on starboard side.
11.26 a. m. Clear of steamer, stopped engines. Captain gave orders to sound ship, ascertain damage and swing out life boats.
Holds making no water, fore peak full up to sea level. Signalled S/S. Alleghany asking him if he required assistance. He replied not to abandon him so we stood by.
12.10 p. m. S/S. Alleghany proceeded towards shore, so us following him at full speed, steering W. N. W. magnetic. S/S. Alleghany stopped and was seen to be settling down aft and crew taking to life boats.
2.5 p. m. Stopped engines close to sinking steamer. Engines used as required picking up crew out of boats.
2.40 p. m. All the crew and passengers safe on board this vessel. Stood by Alleghany until she sank stern first at 3.20 p. m. in Latitude 37.33 and Long. 74.4 W.

165

3.25 p. m. Proceeding full speed ahead back for Newport News.
4.50 p. m. Stopped to ask S/S. Sabine to report by wireless the above collision and report steamer sunk and all the crew and passengers safe on board this steamer and proceeding to Newport News.
5.5 p. m. Proceeded full speed ahead, course S. 70″ W.
8 p. m. Strong wind and rough sea; fine and clear weather.
9.50 p. m. Revenue Cutter alongside and voluntarily offered to escort us into Cape Henry.
11.50 p. m. Cape Charles Light Vl. abeam dist. 3½ miles.
Midnight. Strong wind and rough sea; fine clear weather. Vessel carefully sounded every fifteen minutes but making no water in holds.

(Sgd.) JAS. GRIFFITHS, *Master.*
W. A. WESTGARTH,
Chief Officer.

By Mr. Burlingham:

Q. I observe in this copy of the log that you have an entry at 10.35 A. M. sighted steamer on port bow, and at 11.14 A. M. steamer getting close, and at 11.17 A. M. stop and full speed astern; were those times by clock or watch?

A. No.

Q. How were you able to fix the time 10.35; by bells?

A. Not that 10.35, because I slipped in the wheelhouse just at that time to get the telescope, and it was half-past ten then.

Q. So you put it five minutes later?

A. Yes.

Q. Are the other times, 11.14, 11.17 and 11.21 by watch or clock?

A. No, just the time of the collision; the other times are guess work.

166 Q. I observe you say 11.14 steamer getting close. Keeping his course and speed so in order to try and avoid collision I gave one blast of whistle and altered my course to starboard. Other steamer answered by two blasts of whistle, and at 11.17 you have the entry "Stop and full speed astern," and at 11.21 "Collided with steamship Alleghany, my port bow striking him about the bridge deck on starboard side." That makes a period of 7 minutes from 11.14 to 11.21 from the time when you say you gave one blast of your whistle until the collision; is that correct?

A. No.

Q. What is wrong about it?

A. The time is too long.

Q. Is it a fact that there was a period of three minutes from 11.14 to 11.17 between the time when you blew your one blast and your engines were put full speed astern?

A. No, that is where the mistake is.

Q. It is correct to say that there were four minutes from 11.17 to 11.21 between the order full speed astern and the collision?

The cross-examination of the witness by Mr. Burlingham is objected to.

A. No, sir.

Mr. Burlingham: Mr. Smith, have you our scrap log?

Mr. Smith: No.

Mr. Burlingham: Do you know anything about it?

Mr. Smith: No, I don't know anything about it.

Q. I showed you a clipping from a Newport News newspaper with regard to the transfer of passengers in the snow storm;

167 I have here now a paper which Mr. Hughes has given me from a Newport News paper which says the collision occurred it is said before 5 o'clock yesterday morning in a driving snow storm but details are unobtainable. Do you recall whether it is this paper or the other one that I showed you, that the German officer showed you?

A. I don't think it was either of them because the copy was in the middle of the page.

Q. What was the substance of the statement?
A. The part of it was about the snow storm and the collision occurred in a blinding snow storm.

Cross-examination by Mr. Kirlin:

Q. When was it that you took the observation that you spoke of having taken while on watch?
A. Just after I relieved the bridge, probably a quarter of an hour or so afterwards.
Q. What hour?
A. Before 9 o'clock, probably quarter of 9.
Q. Did you get a good sight?
A. It wasn't a sight; just the bearing of the sun to find the deviation or the error of the compass.
Q. You were able to ascertain your position by that?
A. No.
Q. At 10.35 according to your memorandum you sighted a steamer on the port bow steering to southward?
A. Yes.
Q. Bearing about northeast?
A. Yes.
Q. Did you take that bearing by the compass?
A. It was not a proper compass bearing; I just glanced over the top of the compass and took a rough bearing.
Q. It was not a guess; you looked at the compass?
168 A. It was not a true bearing, not an accurate bearing.
Q. You looked over the compass at the vessel?
A. Yes.
Q. This was as near as you could come to it without taking a more careful bearing?
A. Yes.
Q. You were at that time steering by compass east by north?
A. Yes.
Q. The vessel was three points on your port bow approximately?
A. Yes; it would be more than that.
Q. It would be three points if that is correct?
A. Yes, if that is correct, if the bearing is correct.
Q. You intended it to be correct when you put it in the log?
A. It was partly what I remembered afterwards that I put in the log book because I didn't take any note of the bearing at the time.
Q. You put it in a good deal nearer the time of the occurrence than to-day?
A. Yes.
Q. That was your best recollection at the time?
A. Yes.
Q. When did you put this down in the log book?
A. Obout 1 o'clock.
Q. The matter was all quite fresh in your mind at that time?
A. Yes.
Q. Are you familiar with the general course of vessels steering to

the southward at that point? Could you judge about what the course of the steamer would probably be?

A. Yes, I could tell that pretty well by the way he was coming down.

Q. What did you think he was steering?

A. About south.

Q. You were approaching one another within one point of a right angle?

A. About that I should say.

Q. You kept on as I understand you for about three-
169 quarters of an hour without making any changes at all or giving or receiving any signal?

A. Yes.

Q. Did you watch the bearing of the other vessel?

A. Yes, just roughly.

Q. During this three-quarters of an hour?

A. Yes.

Q. Did she still continue to bear northeast from you?

A. Practically; she did not alter the bearing at all.

Q. Did you remain on the bridge all the time?

A. Yes.

Q. Were you watching the vessel attentively all the time?

A. Yes.

Q. When did you begin to use your glass on her?

A. Probably when seven or eight miles away; I looked at her first of all with the glass to see what it was.

Q. Did you recognize what it was?

A. Yes.

Q. That you did before the collision?

A. Yes, sir; 4 or 5 miles away I could see it was a steamer with a yellow funnel; I couldn't see his name until he got 2 or 3 miles away.

Q. Did you recognize what line she belonged to?

A. No; I thought she was a Hamburg-American Line because I had seen so many of them, but she had no distinguishing mark at all except the funnel.

Q. When she got to about a mile off you first considered there was risk of collision?

A. Yes.

Q. Then you blew one blast of the whistle?

A. Yes.

Q. A short blast?

A. Yes.

Q. And immediately ordered the man at the helm to port?

A. Yes, a little.

170 Q. You did not wait to get any reply before you ported?

A. No.

Q. You did not get a reply?

A. I did a little later.

Q. Not before you ported?

A. No, not before I ported; I ported about a point when I gave the one blast.

Q. You say about a point?

A. Yes.

Q. Did you look at the compass?

A. No, sir.

Q. You just estimated after she did swing around, about a point?

A. Yes.

Q. You did something else; what did you do?

A. After she had swung around?

Q. Yes.

A. I did nothing until after I heard him give two blasts of the whistle.

Q. Then what?

A. Full speed astern.

Q. According to your log three minutes elapsed from the time you blew the one blast whistle and ported until you gave the order to stop and full speed astern; was that as near right as you could make it at the time you put the entry in the log?

A. Yes, because I didn't think much about times as they were then.

Q. When did you begin to think further about it?

A. After I had gone through with the case I looked at it and saw it was—it was the captain called my attention to it first of all and asked if I thought it was not too long a time.

Q. When was that?

A. Probably a day or two after we were in Newport News.

Q. Was that after you had gone through the case?

A. No, we had not gone through it at all; he asked me to let him have a look at my log book to see the account I had put in about the collision.

Q. The captain was not on the bridge?

A. No.

Q. He had not any knowledge at all how long it was?

171 A. No, sir, but he asked me the question; I got that down as 11.14 and 11.17, and I knew when the captain asked me, when it was pointed out to me 11.14 that it was not that time; it was about a minute, and when I thought over it I wondered if I had made a mistake taking that from the scrap log book, made a mistake in the 11.14 and 11.17 in the scrap log; we could not find the log to ascertain whether it was right.

Q. What reasons had the captain to think the interval of three minutes was too long?

A. He just passed the remark "Was it three minutes from the time you blew the whistle until he answered you," and I said, "No"; he said, "You have it here," and I said, "It must be a mistake"; that is how it came about that my attention was first called to it.

Q. It did not occur to you there was any mistake about it until someone else suggested it?

COPY BOUND C

A. I had not noticed it, that I had 11.14 and 11.17, not to take notice of the time intelligently.

Q. Is there any other signal that you know of that is ordinarily used by a vessel to call attention of another vessel, to the fact that a dangerous situation is arising and something needs to be done to avoid collision?

A. Not in the rule of the road, no, sir.

Q. Don't navigators use what is called a danger signal at all?

A. No.

Q. Do you know of such a thing as an alarm signal?

A. No.

Q. At the time you got the two blasts back from the Alleghany you gave the order hard-a-port.

A. Yes, full speed astern and hard-a-port.

Q. Had you given any order to the helmsman between the time you ordered him to port a little and the time you ordered
172 him to hard-a-port?

A. No.

Q. Said nothing to him?

A. No.

Q. So that whatever porting he had started to do was still going on at the time you ordered him hard-a-port? ?

A. Practically, yes, sir.

Q. Did you notice the compass at any time from the time you gave the first order to port a little until the collision?

A. No.

Q. Did you notice that after the collision?

A. I can't say I did, not exactly afterwards, up to 5 or 10 minutes after.

Q. Have you any idea how much your ship's head swung under the porting and backing orders?

A. I should think about three points.

Q. Please place these two models so as to show the angle at which the vessels came together?

Witness does as requested.

Q. Mark the compass bearing of the vessels as nearly as you can give them at the moment of collision?

Witness does as requested.

Q. Did you take the time of the collision?

A. The way I got the time of the collision, I did not look at the clock but our bell was struck at 20 minutes past 11 and the collision was just as the bell was finished striking or a moment or so afterwards.

Q. The engine room department must have some record?

A. The chief has it.

Q. Did you compare the times with them?

A. I got the time the engines were going astern from the chief;

CLOSE IN CENTER

from the time I rang the telegraph until the collision I as-
173 sumed how long the engines were going astern.

Q. And he gave you the time 11.17 as the time of stopping and reversing?

A. Yes.

Q. And he told you he felt the shock at 11.21?

A. The chief engineer told me the engines were going astern about four minutes.

Q. Those two times are not your estimates?

A. The time the engine is going astern is the time I got from the chief and the 11.21 is practically the time by the wheelhouse clock, and took the four minutes from that.

Q. Do you know whether the clocks were together?

A. I couldn't say; there is generally a few minutes difference between them, as a rule.

Q. When did you look at the clock with reference to the collision?

A. I didn't look at all; seven bells struck at 20 minutes past eleven and it was shortly after that.

Q. Who struck the seven bells?

A. The ordinary seaman we had.

Q. An extra man?

A. Yes, just a boy, his first voyage to sea.

Q. Why is the bell struck at 11.20?

A. To give the watch coming on deck time to get their dinner before 12 o'clock; that is the general rule; the same 20 minutes past 7 they strike the bell so the men can get their breakfast before they come on deck at 8 o'clock.

Q. Do you still adhere to your belief that the vessels were a mile apart at the time you blew the one blast signal?

A. Yes, about a mile away.

Q. You were proceeding at about 9 knots?

A. Yes.

Q. You were making about a mile in a little less than 7 minutes?

A. Yes.

174 Q. You just got seven minutes here as the time between the time in which you say you blew the one blast whistle and the time you set down for the collision, so that would be approximately correct, wouldn't it?

A. Yes.

Mr. Burlingham: That depends; the difference between the straight line and the hypothenuse——

Q. (Repeated.) You got just seven minutes here as the time between the time in which you say you blew the one blast whistle and the time you set down for the collision, so that would be approximately correct, wouldn't it?

A. If it was seven minutes from the time I blew the blast the ship had not done the mile because the Alleghany was further away from us at the angle——

Q. Before Mr. Burlingham told you anything about the difference between a straight line and a hypothenuse you said yes in answer to that question?

COPY BOUND

A. If the ship had done a mile in seven minutes——
Q. Didn't you answer that question yes at first?
A. I didn't quite catch what you said.
Q. You said yes to it, didn't you?
A. Yes, I believe I did; I thought you meant the ship was a mile away from us at the time I gave the blast.
Q. Did you examine the vessel through your glass at about the time you blew the one blast signal?
A. Yes.
Q. Did you look at the bridge of the vessel?
A. Yes.
Q. Did you have it in your mind at that time there was not anybody on the bridge?
A. Yes, it struck me because I had been watching before
175 and I couldn't see anybody walking about.
Q. Did it cross your mind before that, that there wasn't anybody on the bridge?
A. I couldn't see on account of the dodger being up there; there might have been someone on the corner.
Q. The dodger would not be up high enough so a man could not see over it?
A. If a man was standing back—the dodger comes up probably to his chin.
Q. When you got within a mile you could see pretty plainly?
A. Yes.
Q. You could see then that there was nobody there?
A. No.
Q. In that posture of the matter you blew one blast and ported?
A. Yes.
Q. Without waiting for anybody to come out?
A. Yes.
Q. Did you see anybody come out?
A. Not until we were probably quarter or half a mile from the ship that I saw two or three come running along the deck.
Q. That was the first time you saw anybody come out?
A. Yes, the first time I saw anybody on the deck.
Q. Was that before or after you got the two blasts from them?
A. After I got the two blasts from them.
Q. Who was it blew the two blasts?
A. As far as I could make out it was someone went on the bridge and blew it.
Q. You said you saw them come on the bridge?
A. No, I didn't.
Q. What did you say?
A. I said I saw two or three come on the deck, half a dozen or more came on the deck after he had blown the whistle.
176 Q. Did you see anybody come on the bridge at all?
A. I saw them shortly after they blew the whistle.
Q. After they blew or you?
A. After he blew.
Q. Shortly after the two blasts were blown you saw someone?
A. Yes.

CLOSE IN CENTER

Q. How far were the ships apart then?
A. Half a mile or less, quarter of a mile.
Q. How far were the ships apart at the time the other vessel blew the two blast signal?
A. About half a mile; might have been a little more.
Q. How far do you think they were apart at the time you reversed the engines?
A. As soon as he gave the two blasts I reversed the engines; might have been a few hundred feet or so——
Q. Still approximately half a mile?
A. Yes, or less.
Q. Be as specific about that as you can?
A. That is my best judgment, she was about half a mile away at the time.
Q. When you began to back?
A. Yes.
Q. And when you hard-a-ported?
A. Yes.

A diagram made by the witness is offered in evidence and marked "Yang-tsze Exhibit B (Westgarth) of June 7, 1912."

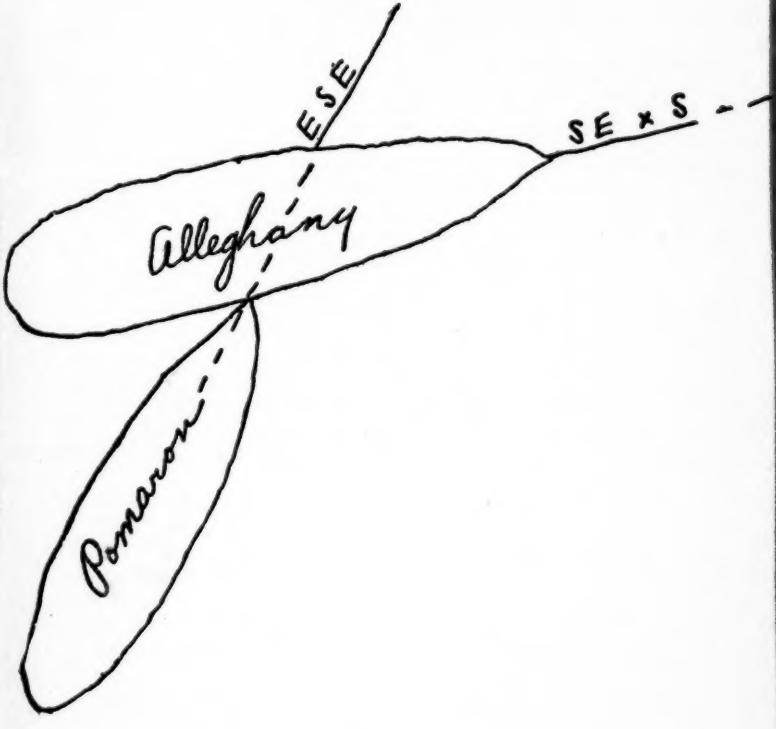
Q. At what point in the approach of the vessels did you consider the collision became unavoidable?
A. As soon as he gave me the two blasts of the whistle.
Q. They were then approximately half a mile apart?
A. Yes.
Q. Have you ever had occasion to notice how long it takes to stop the Pomaron by backing her engines?
A. Yes.

(Here follows diagram marked page 177.)

COPY BOUND C

Yang-tsze Exhibit B (Westgarth)

June 7, 1912.



CLOSE IN CENTER

COPY BOUND CL

178 Q. When she is going full speed?

A. Yes.

Q. What observations have you made on that subject?

A. To bring her to a dead stop it would take about 5 minutes or so.

Q. What observations have you made about it; when have you ever noticed that?

A. When we have been coming into port, or taking up a pilot.

Q. You think it would take as long as 5 minutes?

A. Yes, probably well up to 5 minutes, but I never have timed it really.

Q. How many lengths will she travel before she comes to a standstill after reversal from full speed ahead to full speed astern?

A. I couldn't say exactly how long it would take before the headway would be off.

Q. Do you think she would run more than three or four of her lengths?

A. More than that.

Q. How much more?

A. I don't suppose she would run much more than five or six ship lengths; she might run a little more but I never have actually taken any notice how long it does take.

Q. You did not at any time see any indication of the Alleghany that her navigators intended to go under the stern of your ship?

A. No, sir.

Q. In that condition of affairs you easily could have avoided collision when you saw there was risk by stopping earlier, couldn't you?

A. It was not my place to stop earlier until we were so close that collision could not be avoided by the action of the Alleghany alone.

Q. You considered there was danger a mile off and nobody on the bridge and the bearings had been the same for half an hour?

A. Yes.

Q. That was clear evidence of danger to you?

A. Yes.

179 Q. Clear indication that there would be a collision unless someone did something?

A. Yes.

Q. Instead of porting which threw you across the path of the other vessel you could have easily avoided collision by stopping as you now see it?

A. If I had stopped sooner it certainly would have avoided collision, but then it was not my place to.

Q. There was nobody on the bridge to change the course of the other vessel?

A. There might have been someone keeping lookout some other part of the ship; in the wheelhouse or chart room.

Q. The navigation is ordinarily done from the bridge?

A. As a rule, yes, sir.

Q. It was not being done from the bridge of the other vessel as she came up to you and you knew it?

LOSE IN CENTER

A. As far as I found out since.

Q. You knew it at the time?

A. I knew there was no one on the bridge as far as I could see, although there might have been someone keeping lookout on some other part of the ship.

Q. Have you ever made any observations as to the time that it takes to swing your vessel a point or two by porting when you are going full speed ahead?

A. No, I have never taken any time.

Q. Is she a quick or slow steering vessel?

A. When she is going full speed and you put your helm hard over she comes around fairly quick.

Q. How soon will she begin to swing after you port the helm?

A. Quarter of a minute or less than that if you put it hard over, but if you put it over a little way it will take longer, she will come very easily.

Q. She will begin to swing almost immediately?

A. Yes, if you put the helm hard over.

Q. How fast will she swing, how long will it take to swing two or three points?

A. Not very long to swing two or three points if you had
180 it hard over.

Q. When the other vessel gave you two blasts on the whistle what did that indicate to you?

A. That he was going to put his helm to starboard and try to cross ahead of me.

Q. He was half a mile off then?

A. Yes.

Q. Or approximately so?

A. Yes.

Q. Wasn't there plenty of time for you to starboard at that time and go under his stern?

A. No.

Q. You could swing two points in half a mile?

A. Not the way he was swinging around at the same time.

Q. His boat was not a very long boat, was it?

A. No, sir, about 300 feet.

Q. Her stern would not have swung a great deal; she only changed her heading altogether about three points according to your estimate; if you were half a mile off, and had distinct notice that the other vessel was starboarding her helm; wasn't it within your power to avoid collision by starboarding your helm instead of porting it?

A. I don't think so.

Q. Don't you think so now?

A. No.

Q. If you had not begun to port before that you would not have continued when you got the two blast signal?

A. I should never have starboarded.

Q. At the distance of half a mile?

COPY BOUND CL

A. No, not after he answered my one blast signal like that and gave me two.

Q. Giving two notified he was going away from you?

A. He couldn't in time though.

Q. You want to go on record as stating with a vessel half a mile away from you, having given you two blasts indicating she
181 was going to starboard her helm, that you could not starboard your helm and swing off two points to port?

A. Might do it.

Q. At the time the vessel was half a mile away when she gave the two blasts what was her bearing from you?

A. How many points on the bow?

Q. Yes.

A. Probably about four points, three or four points on the bow.

Q. She was a faster vessel than you were?

A. Yes.

Q. She was only three points on your bow to begin with?

A. Yes.

Q. She could not have been many more unless you increased the distance by porting; do you think she was four points on your bow?

A. Three or four points; I didn't bother to take any bearings at all.

Q. Starboarding two points would have cleared her, wouldn't it?

A. I hardly think it would; it might have.

Q. She was going ahead all the time?

A. Yes; we were going ahead at that time as well.

Q. That would give you better steerage way?

A. But it would bring us pretty close together before we got around.

Cross-examination by Mr. Kneeland:

Q. Did you send the steward to call the captain?

A. Yes.

Q. Where was the steward?

A. Outside the galley at the fresh water tank getting some fresh water.

Q. Did you sing out to him?

A. Shouted out from the bridge; it is only 30 or 40 feet from the bridge.

182 Q. He was forward of you?

A. No, abaft of me.

Q. When was it that you told the steward to call the captain?

A. About—I don't know the exact time, but about the time I gave the one blast, then I saw the steamer was getting pretty close to us, that I gave the one blast.

Q. Before she had blown two?

A. Yes.

Q. How long before?

A. It wasn't very long, in fact I forgot whether it was before I had given the blast or after I had given the blast; I think it was after I had given the blast and after the Alleghany had given two

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blasts; if I remember right I think that was the time I shouted out to the steward, because up to that time I thought there was no necessity of calling the captain.

Q. The steward had to go way aft and call the captain?

A. Yes.

Q. Had you reversed your engines before you sent the steward?

A. I think I must have; I am not quite certain; it all depends—the blast and reversing of the engines were all within a minute or so, about a minute; whether it was before or after—I think it was after that that I sent the steward to call him.

Q. How long was it after the two whistles were blown by the Alleghany that you reversed?

A. As soon as he gave the two whistles, as soon as I heard them.

Q. It was after that that you went and called the steward and told him to go aft and call the captain?

A. Yes.

Q. He had to go way to the stern of the ship?

A. Yes.

Q. Could you judge the comparative speed of the two vessels as you watched the Alleghany approach?

183 A. I could see she was going much faster than us.

Q. How much faster was she going than you were?

A. Three or four knots at the time faster; that is, according to the speed the other steamer was going; they generally average about that speed.

Q. As she continued to approach you you could form an estimate of how fast she was going, couldn't you?

A. Only roughly.

Q. Then it was quite certain she was coming faster than you were?

A. Yes, much faster than us.

Q. You saw her first about three points on your port bow bearing about northeast?

A. Yes; perhaps she was more than that; if I had taken a correct bearing——

Q. It might have been less if you had taken a correct bearing?

A. Yes.

Q. When she was half a mile away she was then not more than three points on your port bow?

A. She was about that.

Q. And at that time you changed your course how much to starboard?

A. About a point.

Q. So she was continually getting across your bow?

A. Closing in very quickly on us; the bearing was hardly changed at all until we got too close to be safe.

Q. The bearing at least had changed a point between the time you first saw her and the time she was half a mile away?

A. I don't think it had.

Q. If you changed a point to starboard and the bearing on both occasions was three points it seems she had closed up one point?

COPY BOUND C

A. It would have been more than that; she must have been more than the angle we struck at.

184 Q. The angle you struck at was after he had changed further and after you had changed?

A. Yes.

Q. If you have a vessel going faster than you are running almost at right angles with you and she bears three points on your port bow, if you both keep your courses she will cross you in safety?

A. If she is at right angles, yes, sir, but she was not at right angles at all.

Q. She was very close at right angles?

A. That is only a rough bearing.

Q. You said she was steering a course of south?

A. Yes.

Q. You were steering east by north compass, course?

A. Yes.

Q. In regard to these times entered in your scrap log I understand you first had some doubt raised in your mind as to whether there were three minutes between your blowing your one whistle and her blowing her two and your reversing?

A. Yes.

Q. And it was the captain who called your attention to that?

A. Yes.

Q. Did he tell you that was a very material fact in the case?

A. No, he just pointed out to me that the times—he was reading them through and came down to 11.14 and said, "Is that right," and I said, "No, I must have made a mistake."

Q. You recognized the minute he called your attention to it that it was a very important point in the case?

A. I didn't take much notice of it at the time, no sir.

Cross-examination by Mr. Harrington:

Q. When the captain called your attention to this time he said, did he not, that that was a pretty long interval to have in

185 there?

A. No, he didn't pass that remark at all; I forget exactly the conversation that did take place between us.

Q. As I recall your first testimony on the point, you said as I recall it, that the first time you noticed this interval which you now say was a mistake, was when the captain pointed out to you and asked if it was as long as that or some such words as that, isn't that right?

A. Did I say that this morning?

Q. My recollection is you said something of that sort but I am not sure.

Mr. Kirlin: Yes, he said that.

By Mr. Kirlin:

Q. That is, you had not noticed it until the captain asked you about it?

A. Yes, sir.

LOSE IN CENTER

By Mr. Harrington:

Q. The point I wish to make is when the captain did call your attention to it he pointed out that it was a rather long interval, isn't that so?

A. No, that was not my meaning at all.

Mr. Burlingham: He said the captain asked if it was right.

Q. You don't know why the captain asked whether that was right?

A. No, sir, I had no idea at all why he asked; it was the first time he saw my log book and he said, "Are you sure these times are right," and when he was running them down, when he got to this I said——

Q. Tell me in what place were you looking at this entry; in the scrap log or in your chief officer's log?

A. In my chief officer's log.

186 Q. Not in this thing you have written off?

A. No, in my log book.

By Mr. Kirlin:

Q. Had you written this up before the captain spoke to you about it?

A. No, that was after.

Q. Which was after?

A. This was after.

Q. That you made the copy?

A. Yes.

By Mr. Harrington:

Q. You took this off after the captain pointed it out to you?

A. Probably ten days or a fortnight after.

Q. Ten days or a fortnight later you took this copy?

A. Yes.

Q. So that before your captain called your attention to the long interval you had entered it in the scrap log at one o'clock after the collision and then after you got to Newport News had transcribed that from the scrap log into your chief officer's log?

A. Yes; that is why I said it must have been a mistake copying that from the scrap log into my log book; I had the chief officer's log book; when we both went down these times together I could see at once it was not three minutes from the time I blew the whistle until he answered, because it would not take that long to get from the chart room or wherever he was, up on to the bridge, and when I came to think over it afterwards it was not immediately, but a very short time afterwards.

Q. How far was the Alleghany when you first sighted her?

A. 10 or 12 miles away I should think.

Q. At a bearing of northeast?

A. Yes.

COPY BOUND C

187 Cross-examination by Mr. Smith:

Q. It is more risky for your bow to strike another vessel or to have the other vessel's bow strike you?

A. More risky for us—how do you mean?

Q. Is it more dangerous for the Pomaron to come head on into the Alleghany amidships or to have the Alleghany come head on into the Pomaron amidships?

A. For us, it is more dangerous to have the Alleghany come into us like that.

Q. So that by porting ahead it would be more dangerous for you than to starboard and try to go astern of her?

A. We were too close then at the time I took action—we were too close for me to starboard; I didn't know up to the time we were a mile away, I expected all the time to see him port and come under my stern, and when he didn't do that he was getting too close.

Q. You executed the manoeuvre you thought was most likely to prevent any collision whatever?

A. Yes.

Q. As regards the risk of the two vessels at the time you made the manoeuvre did you have it in mind it was more risky for you to be struck by the Alleghany than it would be for you to strike her with your bow?

A. Not at the time, I didn't think about that.

Q. Is that a principle of seamanship that is in your mind, that you realize?

A. Yes, it would be better for us if he could strike us on the bow.

Q. That is fundamental in seamanship?

A. Yes.

Redirect examination by Mr. Burlingham:

Q. Do you think you would have a right to depart from the rules of the road in order that you might not be struck in a
188 certain way?

A. Not until we were too close and collision could not be avoided by the giving way of the vessel alone.

Q. You said to Mr. Smith just now that you expected every moment that the Alleghany would port her helm and go under your stern?

A. Yes.

Q. Would you have thought it safe before she blew her two blasts for you to stop your engines and reverse them?

A. Did I think it safe, no, sir.

Q. I understood you to say to Mr. Kirlin that when the Alleghany blew two blasts you thought a collision could not be avoided, is that so?

A. Yes.

Q. What did you think about the possibility of collision when you blew one blast?

A. My thoughts at the time were that if he had blown one blast

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and altered his course to starboard, if he had ported his helm he could have gone under my stern.

Q. But that if he had not, what?

A. A collision surely.

Q. Would it have been safe for you to starboard your helm?

A. No.

Q. In that situation with no change of bearing of the other vessel what did that indicate to you?

A. That there was danger of collision.

Q. Is there anything in the rules about that?

A. Yes, there is an article in the rules about it.

Q. What is the rule in regard to that?

A. Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of the approaching vessel. If the bearing does not appreciably change such risk shall be deemed to exist.

Q. That is in the International Regulations?

A. Yes, that is the first part of Article 17.

Q. You have not learned it for this occasion?

A. No, sir, I have known it since I was on the——

189 Q. Of course you recognize, you know that under the International Rules, having the Alleghany on your port hand it was your duty to maintain your course and speed?

A. Yes.

Q. You did maintain your speed, did you?

A. Yes, right up to the time I received the two.

Q. Until you thought collision was inevitable?

A. Yes.

Q. But you changed your course?

A. Yes.

Q. Why?

A. Just to give the Alleghany a little more clearance.

Q. Did you think there was possibility of collision then?

A. No, sir, not at that time, not if he had ported his helm, there would have been no collision at all.

Q. If he did not?

A. If he did not do something there would be a collision.

Q. Is it a fact that between 11.17 and 11.21, that is, during the four minutes between the order to reverse your engines and the collision you were proceeding at a rate of 9 miles an hour?

A. Not the whole time, no, sir.

Q. Would you venture to say what your speed was minute by minute during that four minutes?

A. I suppose the first minute she would not have taken much headway off; she would be going about 9; during the second minute she might have taken two knots off the speed.

Q. The third minute?

A. Another two, or a little more, probably 2½.

Q. And the fourth?

A. About the same.

COPY BOUND C

Q. What would that bring her down to at the moment of collision?

A. Not more than two knots.

Q. Is this based on any experience?

A. Just the time I have seen it take to come to a standstill.

Recross-examination by Mr. Kirlin:

190 Q. Have any tests been made since this collision of the manœuvring capacity of the Pomaron?

A. No.

Q. Either as to length of time it would take to stop her or the distance she would travel in stopping or the time she would require in turning?

A. No.

Q. No experiments of any kind have been made?

A. No, sir, not to my knowledge.

Q. In order to get the matter quite plain on the record will you tell us when it was that in your judgment the circumstances had developed so that collision became unavoidable unless you did something?

A. Really not until the Alleghany had given me two blasts on the whistle.

Q. Up to that time you had appreciated risk of collision from the time you blew your first whistle?

A. Yes.

Q. But you thought it might have been avoided by the other vessel until she gave you two blasts?

A. Yes.

Q. Then she was half a mile away from you?

A. Yes.

Q. Bearing about three points as I understand you on your port bow?

A. Yes.

Q. Then it became under the rule your duty to do something?

A. Yes.

Q. It had not been your duty to do anything before that?

A. No, sir.

Recross-examination by Mr. Kneeland:

Q. You stated you departed from the rule which required you to keep your course?

A. Yes.

191 Q. Having the other vessel on your port bow?

A. Yes.

Q. In order to give her more room?

A. Yes.

Q. You realize if you had not ported your wheel the collision would have not occurred?

A. Yes, it would have; she would not have crossed our bow.

Q. In spite of the fact you having changed your course to star-

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board at least a point, and that you ran for anywhere from 5 to 7 minutes?

A. Yes.

Q. And that you struck her aft of the engine?

A. Yes.

Q. Having that in mind do you think collision would have happened if you had not ported your helm?

A. Yes, it would have happened in any case; she would have caught us somewhere probably about amidships if I had not ported.

Q. Even if she had starboarded?

A. If he had gone hard-a-starboard and gone right around he would have cleared us if he had done it in time, but he could not have crossed our bows.

By Mr. Kirlin:

Q. You don't know how much you had ported before you began hard-a-porting?

A. Probably very little; as far as I could judge it might have only been a point, and it might not have been.

Q. You had been porting at least a minute according to the correction you have attempted to make this morning, but according to the log you had been porting three minutes before you hard-a-ported?

A. Yes, but the helm was steadied previous to that; the helm was just ported a little and the man at the wheel would see the ship swing off and steady up again.

Q. You said you did not say a word to the man about steadying?

A. No, I didn't.

192 Q. You don't mean to say the man did steady from anything you saw?

A. No, sir, not anything I saw, but as a rule, they do that when you say port a little.

Q. We don't want to take any rule; are you in a position to make oath that your ship had not swung two points under this porting before you gave the order to hard-a-port?

A. No, sir, she wouldn't swing two points; if she swung a point it would be as much as she did; you can pretty well tell for that matter how far she does swing.

Q. You did not have any object in front of you by which you could measure the angle?

A. No, but you could see her wake; the wake had not altered much.

Q. You were giving pretty close attention to the other ship, weren't you?

A. Yes, I was watching through the glass, but you can look back at the same time; I was looking to see if there was anybody about to send for the captain when she was getting as close as that.

Q. You did not make an entry in your log about how much of a swing it was?

A. No.

Q. Did you have anything in the scrap log about that?

COPY BOUND C

A. I don't think so; if I had it in the scrap log I should put it n mine.

By Mr. Kneeland:

Q. Where was the steward?
A. On the starboard side.
Q. The man you actually found was not on the side the vessel was, but on the starboard side?
A. Yes.

193 By Mr. Harrington:

Q. You figure the Alleghany was a much faster vessel that you were?
A. Yes.
Q. You made your observation of her as she approached; you could see that that was so?
A. Yes.
Q. You know you were making about nine knots?
A. Yes.
Q. I suppose you figure she was making 12 or 13?
A. Yes.
Q. You realized that at the time she was a mile away?
A. Yes.
Q. At that time she was at a bearing not more than three points on your port bow?
A. It would be sure to be more than three; that is down in the log book.
Q. The testimony offered has been it was a bearing of three points on your port bow when she was a mile off?
A. Yes.
Q. You then realized she was making 12 or 13 knots an hour?
A. Yes.
Q. At that time could you see with your glass that there was no one on her bridge?
A. Yes.
Q. Up to that time it was plain to you she was on a southerly course?
A. Yes.
Q. Steering about south?
A. Yes.
Q. And up to that time there was no indication whatever on her part of any intention to change, to go under your stern?
A. No.
Q. Everything indicated she was steering a southerly course straight and intended to keep it?
A. Yes.
Q. It was in that situation that you blew one whistle and ported your helm?
A. Yes.
Q. The man at the wheel was an apprentice?
A. Yes.

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194 Q. Probably on his first trip?
A. No.
Q. You gave no order to steady after the order to port?
A. No.
Q. And you don't know whether he steadied or not?
A. No.
Q. You ran at the same speed of nine knots a distance of half a mile?
A. Yes.
Q. The Alleghany continued on her southerly course?
A. Yes.
Q. Heading precisely as she had been all the time you observed her?
A. Yes.
Q. It was still plain to you there was no one on the bridge?
A. Yes.
Q. And your one whistle signal remained unanswered?
A. No, she answered by two blasts.
Q. You blew your one whistle signal when you were a mile apart?
A. Yes.
Q. You ran a distance of half a mile, you reduced the distance between you half a mile with this apprentice carrying out the order to port the helm and the Alleghany continuing on her course faster than you were?
A. Yes.
Q. With no one on her bridge and your one whistle signal unanswered?
A. Yes.
Q. When the vessels are half a mile apart the Alleghany bears still three points on your port bow?
A. Yes.
Q. And it was then that you got the two whistle signal from her?
A. Yes.
Q. That of course was a positive indication to you that she was going to starboard her helm and continue on across your bows?
A. Yes.
Q. And then it was that you put your helm hard-a-port and kept it there until you struck?
A. Yes.
Q. You struck her abaft the engine room?
A. Yes.

195 Q. Isn't it perfectly plain to you that if at the time you sighted the Alleghany at a three point bearing on your port bow a mile away, going as you knew at 12 or 13 knots and you were only making 9, that if you had held your course as you were required to do by the rule, that she would have passed you in safety before your courses intersected?
A. She would not have done it; that is where I made a mistake in taking the bearing by the compass of the Alleghany.

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By Mr. Burlingham:

Q. You think the northeast bearing mentioned in the log is not correct?

A. No, it can't be correct.

Q. How many points do you think you should have her on your port hand?

A. It should have been 5 at least, I should say.

Q. All these questions and answers are based on a three point bearing instead of five points?

A. So I understood because they were taken from the log book; I am answering my questions as the Alleghany approached us just as I remember it without any compass bearing or anything of that kind.

Q. What is your recollection as to what her bearing was when you first saw her?

A. She would be five points, four or five points on the bow.

By Mr. Kneeland:

Q. When she was 10 or 12 miles away?

A. Yes.

By Mr. Burlingham:

Q. And you say it did not change?

A. Did not change.

Q. That is what you said on your direct examination in answer to my question?

A. Yes.

196 Q. When Mr. Kirlin called your attention to the entry in your log that when seen she was northeast, then it worked out three points?

A. Yes.

Q. Is that correct or is the first correct?

A. The first is correct, but I was answering Mr. Kirlin according to the log book.

By Mr. Kirlin:

Q. I ask whether you did not make the entry in the log book of the bearing as you actually thought it was at the time and you told me you did after looking over the compass?

A. I did not take a bearing; I did not notice the bearing; I just walked to the compass and looked over the top of the compass, because the compass is amidships, and by taking, as I very often do, a rough bearing of anything by the stanchion, you can tell whether she is within a point or a couple of points or where she is.

Q. You must have thought at the time she was bearing northeast or you would not have put it in the log?

A. In a northeasterly direction, but whether northeast by north I could not swear at all.

Q. Didn't you put it in your log the way you actually thought it was at the time according to the observation you made across the compass?

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A. It was just a rough estimate of the point that I thought.

Q. You had a compass in front of your face when you were looking at the other boat?

A. I didn't take a bearing from the compass but looked over the top of the compass and I didn't take any particular notice of the point at all.

Q. Looking over the top of the compass you judged the vessel bore from you northeast?

A. Not at the time I didn't.

197 Q. You put it in the log that way?

A. Yes, I put it in the log that way afterwards.

Q. You put it in the log at one o'clock?

A. Yes.

Q. Wasn't that your best judgment at the time of the bearing of that ship when you saw her?

A. I don't think it was.

Q. Do you mean to say you would have put something in the log book which at the time was not your judgment as to the truth of the item you were putting in?

A. As far as I could judge as to the point, but I never worked it out to see how many points she was.

Q. The only reason you doubt it is now you see if she had been bearing the way you put it in the log and both vessels had steered in the direction you say they were steering, and with the speed you thought each of them had there would not have been any collision unless you had ported?

Mr. Burlingham: Objected to.

Q. Isn't that so?

A. It was inevitable that there would be a collision the way she was coming; I couldn't go by the bearing at all; if I had taken a proper compass bearing, but I didn't.

Mr. Burlingham: I wish to call attention of counsel to the fact that the entry does not say northeast, but "about northeast," and all your questions have been based on a northeast bearing.

198 CHARLES JOHNSON, being duly sworn and examined as a witness for the Pomaron, testifies as follows:

By Mr. Burlingham:

Q. You are the chief engineer of the Pomaron?

A. Yes.

Q. And have been how long?

A. I have been with the ship ever since she came out new, 4½ years ago.

Q. You have held chief's certificate how long?

A. 16 years.

Q. How long have you followed the sea?

A. 23 years.

Q. Have you been chief engineer of other vessels?

A. Yes.

COPY BOUND C

Q. How long?
A. 17 years.
Q. How old are you?
A. 43.
Q. When did you go on duty on the morning of February 2nd?
A. 8:30 A. M.
Q. And did you remain on duty until after this collision?
A. Yes, I was on at the time of the collision.
Q. How many engineers do you carry?
A. Three.
Q. Was anybody on duty with you?
A. No.
Q. Divided into three watches?
A. Yes.
Q. Did you have any oilers or donkeymen?
A. Yes, the donkeyman was greasing, on watch.
Q. The collision occurred at what time?
A. 11.24.
Q. By the engine room clock?
A. Yes.
Q. Up to that time how had the engines been running, during the morning?
A. Under orders of full speed.
Q. What head of steam?
A. 180 pounds.
199 Q. What are you allowed?
A. 180 full boiler pressure.
Q. How many knots were you making?
A. Nine knots about on 61 revolutions; that is about the speed of the Pomaron, loaded ship.
Q. That is her speed when she is loaded?
A. Yes.
Q. Had you been on deck or looked out at all?
A. Yes, I was on deck shortly before 11 o'clock.
Q. How was the weather then?
A. Fine and clear.
Q. Did you go out on deck?
A. I went to my berth; I went for the indicator at the time.
Q. You were gone how long?
A. I returned to the engine room with the indicater from my berth about 11.
Q. How long were you out of the engine room?
A. Probably about 5 or 10 minutes.
Q. Do you mean these cards?
A. Yes, I was going to take diagrams.
Q. Then you remained in the engine room until after the collision?
A. Yes, I remained in the engine room until 12.15.
Q. Have you your log here?
A. No.
Q. Have you an abstract of it?

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A. Yes.

It is produced.

Q. Can you remember what orders were received in the engine room prior to the collision?
A. Stop, full speed astern.
Q. Did they come separately or in a heap?
A. Both together, practically both together.
Q. Did you obey the order?
A. Yes.
Q. Were you near the throttle valve?
A. I was in the after end of the engine room at the time.
200 Q. Did you obey it at once?
A. Yes, at once, stopped the engine and reversed it.
Q. Full speed?
A. Yes.
Q. How long were you reversing before the collision?
A. About four minutes.
Q. Did you take that by a clock?
A. By the engine room clock.
Q. Did you enter it on the slate or blackboard?
A. On the slate.
Q. From that was it transcribed into the log?
A. Yes, I copied it from that into the log.
Q. You did it yourself?
A. Yes.
Q. (Handing witness paper.) Is this a copy of your log entries for that day?
A. Yes, that is right.
Q. Independently of that log have you a recollection of the time when the order was given to stop and reverse?
A. Yes, I distinctly know it was 11.20 by the engine room clock, I was standing facing the clock.
Q. Can you tell by independent recollection at what time, the hour and minute, the collision occurred?
A. Yes, I was standing facing the clock at an angle of 40 degrees.
Q. What time was it?
A. About 11.24.
Q. Did you feel the shock?
A. Yes.
Q. Was it a severe shock?
A. Well, it was moderate.
Q. How long did you continue under reversed engines after that?
A. About five minutes.
Q. Have you had any experience as to the way the ship acts going at full speed, and then an order to reverse?
A. She is generally slow in coming astern.
Q. How long will it take to get her way off under those
201 conditions?
A. Under those conditions about four minutes.
Q. Do you know from experience how far she would move from

being at full speed and getting an order to reverse before she would come to a stop, how many lengths or yards?

A. I couldn't say that.

The extract of the engineer's log is marked for identification "Pomaron Exhibit 9 of June 7, 1912," and is hereto annexed (see next page).

Cross-examination by Mr. Kirlin:

Q. Has the steamer triple expansion engines?

A. Yes.

Q. Of what horse power?

A. About 1,000 indicated.

Q. That is the actual horse power as developed?

A. Actual horse power as developed, yes, sir.

Q. 180 pounds of steam?

A. Yes.

Q. Normal full speed revolutions in order to attain nine knots loaded ship is how much?

A. 61 revolutions.

202

S. S. Pomaron from Baltimore Towards Leith.

Chief Engineer's Log, 2nd Day of February, 1912.

Hours.	Engineer's watch.	No. of boilers.	No. of fires.	Pressure by steam gauge.	Vacuum gauge.	Stop valve.
1	12 to 2 a. m. stood by. 12.40 a. m. stop, discharged pilot. 12.53 a. m.					
2	full speed ahead.					
3						
4	3	2	4	180	26	F
5						
6						
7						
8	2	"	"	"	"	"
9						
10						
11	11.20 a. m. stop and full speed astern.					
12	11.29 a. m. stop clear of ship.					
13	2.5 p. m. slow. 2.11 p. m. stop.					
14	3.30 p. m. full speed ahead towards Newport News.					
15	5.10 full speed ahead.					
16	While examining underneath main boilers found part of covering on					
17	end of boilers fallen off.					
18						
19						
20	2	2	4	180	26	F
21						
22						
23						
24	1	"	"	"	"	"

No. of Hours Steam on Main Boiler.	
Under Weigh	Banked Fires
23.37	'40

JUNE 2, 1912.

Throttle valve.	Link motion.	Revolutions.	Feed water.	Sea water.	Temp. Fahr. Discharge.	Temp. Fahr. Engine room.	General remarks, state of weather, sails set, etc.
F	½ 13	61	140	42	100	70	Moderate winds.
"	"	"	"	"	"	"	Moderate wind and sea, Port Qrt.
	11.24 a. m. ship in collision. 12.15 p. m. full speed ahead following damaged ship. Engines used as required attending on damaged ship. 4.50 p. m. stop.						
F	F	61	140	42	100	75	Fresh head wind and moderate sea.
"	"	"	"	"	"	"	Weather moderating.

(Signed) C. JOHNSON,
Chief Engineer.

Q. That is the number you were making that morning?
A. Yes.
Q. Was the ship fully loaded?
A. If I remember right she would be a little light; I wouldn't be certain.
Q. What is her loaded draft?
A. It was the winter months; I am not certain but I think 17.10 is full draft summer line, but I am not certain how she stood when she was running then, but I don't think she was quite down to the mark.
Q. Sixteen and two-tenths forward and 16.4 aft?
A. Yes, fresh water.
Q. Four and one-half less in salt water?
A. Yes.
204 Q. That would be a little less than 16 feet draft?
A. In Salt water, yes.
Q. How much would that be above normal full draft for winter?
A. I couldn't say; I don't know really; I know her fully loaded summer draft is 17.10, but I couldn't say the winter draft.
Q. It would be something like a foot light?
A. Not as much as that.
Q. How much?
A. I couldn't say; probably about 8 inches, I should say.
Q. Would that make a difference in her speed?
A. No, it makes very little difference in it, 15 feet draft up to full draft.
Q. What kind of a propeller has she?

COPY BOUND C

A. Right-handed propeller, four-bladed.
Q. Bronze wheel?
A. No, sir, cast iron.
Q. What is the diameter of it?
A. Fifteen and five-tenths.
Q. From tip to tip?
A. Yes, sir, 15.5 diameter and 15.5 pitch.
Q. What is the normal slip in the open ocean, nine knots speed?
A. Four per cent.
Q. When you get an order as you did that morning to reverse. what do you have to do in order to carry it out?
A. The first thing the telegraph is answered, and you shut the up for the intermediate stop valve.
Q. Is that a screw valve?
A. Yes.
Q. How many turns does it require to shut it off?
A. Four turns, square thread valve; there is an auxiliary valve on the main boiler to open, and the intermediate valve between that and the reversing engine before you get the steam onto the reversing engine; those are practically within six feet of one another; you open those and you reverse and then turn the steam on.

205 Q. Did you do all this yourself?

A. I opened the intermediate valve, and the donkeyman opened the intermediate valve on the boilers; he answered the telegrpah while I was passing from the after end of the engine room to the reversing engine.
Q. How far away were you from the reversing platform?
A. Twelve feet from the reversing engine.
Q. On the same level?
A. Yes.
Q. You were not long getting to the levers?
A. I was on the same platform at the time within 12 feet of the reversing gear, and I went straight to the reversing lever and the donkeyman answered the telegraph and opened the auxiliary valve on the boiler, and I opened the intermediate valve.
Q. Going astern under those circumstances the engines would naturally be slow starting off?
A. Yes.
Q. Could you give us a rough idea of how many revolutions the engines made astern before the collision?
A. At the time of the collision they were going full speed and in the early part of the collision I don't suppose they would be making more than 25 or 30 revolutions the first minute, if that; of course, they gradually gain their speed, and at the time of the collision the engines would be making 60 revolutions I dare say.
Q. Do you think they had made 60 revolutions for as much as a minute?
A. Yes, they had been making 60 for a minute; the last minute they would make 60 revolutions.
Q. The minute before the last how many would they make?

CLOSE IN CENTER

A. It is hard to judge; they might be only making 40 or 45.

Q. Have you ever made any study of the maneuvring power of vessels of different sizes?

206 A. Yes, I have tried different sized ships I have been in, I have tried the stopping time, but in these full line ships they take some stopping.

Q. This is rather a long time to stop a ship 278 feet in length?

A. Not under the conditions.

Q. Smooth weather?

A. Fair wind and sea; fair wind and sea moderate; I think it is moderate sea; it is in my log book.

Q. Nevertheless the time was rather long as compared with the ordinary time taken to stop ships?

A. I don't know; they vary very much in full power ships; I have had a lot of experience in regard to new ships and under the conditions at the time I think about four minutes would be about near it; because the first minute they are practically—the ship will be at about nine knots still and it would take about half a minute to get the engine reversed, and I might be half a minute out in the clock, the angle I was standing to see, so one thing and another I should reckon it is somewhere near it.

Q. It might have been a little less than four minutes?

A. Certainly it might have been a little less; I might easily have been out half a minute or three-quarters, the angle I was with the clock, because I took it standing with my hands on the lever and the clock would be 14 feet away.

Q. Three minutes would be nearer the usual rule for stopping?

A. Yes.

Q. Than four?

A. Yes, I should say so in smooth water and no current or anything; it depends on where you are, in a river or where you are, and the conditions; these lines of ships are not like yachts; the co-efficiency of fineness is not the idea.

Q. Did you have any talk with the officer on deck about the times?

A. The chief officer?

207 Q. Yes.

A. The chief officer asked me the time we should be going astern from the time the order was given, and I think, if I remember right, I told him about four minutes.

Q. Did you tell him about what time, according to your clock, you got the order to stop?

A. No, I didn't tell him anything about the time.

Q. Do you know how close the clocks were together?

A. I couldn't say that, but I know there is generally a little difference; our clock gains a little, I think, if I remember right, and we generally put the clock right at noon, at which time the position of the ship is worked up, and when they work the position they ring the telegraph down below and the engine room clock is put right.

Q. Your clock at 20 minutes past 11 would be a little ahead?

COPY BOUND

A. Yes, our clock runs a bit fast.
Q. Do you recollect what the difference is in 24 hours?
A. I couldn't say exactly now, because sometimes they stop and regulate the clock, the junior engineers, and sometimes it will go ten minutes in the day and other times it will go five.

Redirect examination by Mr. Burlingham:

Q. Did you hear any remarks made by the officers of the Alleghany about the collision?

Mr. Kneeland: Objected to as incompetent.

A. Not the officers, but I remember on our way to Newport News back, I was in conversation with one of the sailors which I took to be a quartermaster off duty.

Mr. Kirlin: I object to any conversation between the quartermaster and the engineer.

208 Q. Did you hear any conversation between the officers of the ships?
A. No, sir.
Q. Were you in the mess room when the chief officer of the Alleghany came in with a newspaper?
A. Yes, I was in the engineer's mess room when the chief officer of the Alleghany came to the mess room.
Q. Did you hear him say anything?
A. He had a newspaper, a Newport News paper in his hand, and he said to the chief officer, "Have you seen the paper?" and I don't think our officer replied; he said, "Here you are, this is all right, stick to this," and he put his finger on the print.
Q. What was the passage?
A. After he left the passage was something about a blinding snow storm; I don't recollect exactly.
Q. Was there any snow storm?
A. No, sir, none at all; there was no snow storm, it was perfectly clear and the sun was shining.
Q. Will you tell us what you heard the quartermaster of the Alleghany say?

Objected to.

A. On the way back to Newport News one of the sailors which I took to be a quartermaster off duty, in conversation I said to him, and he said to me, "It is a bad job for the mate, you know he was not on the bridge at the time, he was washing his hands in the chart room." I said, "Where was the man at the wheel"; he said he didn't see nothing.

209 JOHN HYSLOP, being duly sworn and examined as a witness for the Pomaron, testifies as follows:

By Mr. Burlingham:

Q. How old are you?
A. Nineteen.

LOSE IN CENTER

Q. How long have you been going to sea?
A. Nineteen months.
Q. In what vessel?
A. The Pomaron.
Q. All the time.
A. Yes.
Q. Have you been on her since you left school?
A. No, sir.
Q. What experience have you had before?
A. I was head salesman in a big shop before that.
Q. Then you went to sea 19 months ago and have been on the Pomaron steadily?
A. Yes.
Q. How are you carried on the articles?
A. As an apprentice.
Q. What does that mean exactly?
A. I am learning to be an officer; I am getting my time in now.
Q. How many years does it take?
A. Four years.
Q. Four years' sea service to become an officer?
A. Yes.
Q. What are your duties on board ship?
A. Practically the same as a sailor.
Q. Do you keep lookout?
A. Yes, on the lookout the same as the sailors.
Q. Do you sleep in the forecastle?
A. No, sir, I sleep along aft.
Q. With the officers?
A. Yes.
Q. You eat with the officers?
A. Yes.
Q. But you perform all the duties of the sailors?
A. Yes; of course there are some things I have not got to do that they do.
210 Q. You don't have to wash decks?
A. Yes, I have to do that too.
Q. Do you take your trick at the wheel?
A. Yes.
Q. Regularly?
A. Yes.
Q. Do you have quartermasters on the Pomaron?
A. No, just a crew.
Q. The crew take their tricks?
A. Yes.
Q. When did you come on duty the day of the collision?
A. Ten o'clock.
Q. To serve how many hours?
A. Two hours at the wheel.
Q. When did you go to the wheel?
A. I came on deck at 8 o'clock and went to the wheel at 10.

COPY BOUND C

Q. Who did you relieve at the wheel?
A. Newman.
Q. What course was given?
A. East by north compass course.
Q. Did you maintain that course?
A. Yes.
Q. Through the watch?
A. Yes.
Q. How was the weather when you went to the wheel?
A. Fine weather.
Q. Any snow?
A. No.
Q. Or rain?
A. No.
Q. Is the wheel on the bridge?
A. Yes.
Q. On the upper bridge?
A. Of course there is only one bridge.
Q. Is there a wheel house too?
A. Yes.
Q. Where is that?
A. On the bridge deck.
Q. Below where you were?
A. Yes, just below.
Q. The wheel there was not in use?
A. No.
Q. You were steering from the bridge?
A. Yes.
Q. In the open?
A. Yes.
Q. You steer by steam?
A. Yes.
Q. Who was on the bridge with you?
A. The mate, Mr. Westgarth.
211 Q. Could you, from where you were, see the indicator?
A. Yes.
Q. How were you going along?
A. Full speed ahead.
Q. Do you recall what the wind was?
A. It would be about west.
Q. You had a fair wind?
A. Practically fair wind.
Q. How much of a breeze was it?
A. Just a light breeze.
Q. What was the first you knew of the presence of the Alleghany?
A. I saw her between four or five points on the port bow.
Q. Did anybody call your attention to her?
A. No, sir, they never speak to the man at the wheel.
Q. How far away do you think she was?
A. Ten or twelve miles.

CLOSE IN CENTER

Q. Any difficulty seeing her?
A. No.
Q. Did the mate use his glasses?
A. Yes.
Q. You did not, of course?
A. No, I can't leave the wheel to go down below to see what is going along.
Q. Did the vessels approach each other in this way?
A. Yes.
Q. She was on your port hand?
A. Yes.
Q. How many points?
A. Between four and five.
Q. Was there any change in bearing after that?
A. No.
Q. Tell us what happened; what orders were given?
A. She would probably be about a mile away when I got the first order from the chief officer.
Q. How was she bearing from you then?
A. Just the same, between four and five points, never altered her bearing at all.

212 Q. What was the order you got?
A. He blew one blast and gave me an order to port a little.
Q. What were his words to you?
A. Port a little.
Q. Did you?
A. Yes, I gave her a stroke or two and she went over about a point.
Q. Did you steady the helm or keep it over?
A. I had it to port all the time.
Q. You say she went over a point; if you had your helm to port all the time, why didn't she go over more?
A. I mean before he gave me the order to hard-a-port.
Q. You said the order given to you by the mate was port a little and that you ported a point?
A. Yes.
Q. Did you steady your helm after that?
A. No, I had it to port all the time, and she went over a point before he gave me the order hard-a-port.
Q. She had made a point when he gave the order hard-a-port?
A. Yes.
Q. What order did he give to the engines?
A. Full astern.
Q. When, with reference to the order hard-a-port?
A. When they blew the two blasts from the Alleghany.
Q. How long was that after your one blast?
A. Probably less than a minute I should think.
Q. When you heard the two blasts of the Alleghany what orders were given by the mate?
A. Hard-a-port and put the engines full astern.

COPY BOUND C

Q. Were those orders at the same time or at different times?
A. He was standing by the telegraph and he put it over—hard-a-port, he said.
Q. At the same time?
A. Practically at the same time.
Q. And you obeyed that order?
A. Yes.
213 Q. Could you feel the vibration of the engines as they reversed?
A. Yes; I could see the indicator too.
Q. Did you swing much to starboard?
A. She would be about east southeast when we struck.
Q. Did you look at the compass?
A. Looking at the compass; looking at the ship, too.
Q. Do you know what the Alleghany did?
A. She starboarded her helm.
Q. How do you know?
A. Because you see them swinging to port; that was after she blew the two blasts; she didn't alter her coure at all before that.
Q. Could you see the bridge of the Alleghany?
A. Yes.
Q. See any men on her?
A. No, couldn't see; they had the dodger up.
Q. Do you know whether there was an officer on the bridge?
A. I couldn't say.

Cross-examination by Mr. Kirlin:

Q. Did the lookout report the other vessel?
A. No, there is no lookout through the day; only at night.
Q. You had no lookout stationed?
A. No.
Q. Nobody on the bridge but you and the mate?
A. No.
Q. The bridge seems to be very far back on this ship according to the photograph; how far back is it?
A. Right on the fore part of the bridge, on the deck.
Q. According to the photograph it seems to be more than half way back?
A. No, sir, it is not; this house here is about amidships (pointing to the galley).
214 Q. Is the smockstack forward of amidships?
A. Yes.
Q. The middle of the ship, rather, fore and aft?
A. Just about the middle of the ship.
Q. You saw the ship when she was about five miles away?
A. Ten or twelve miles off when I saw her.
Q. Did you take any compass bearing of her?
A. No, I just noticed she was about between four and five points on the bow.
Q. What did you notice that by?

LOSE IN CENTER

A. By the compass.
Q. How was she bearing on the compass, did you notice?
A. She would be between four and five points on the bow.
Q. Did you notice upon what point of the compass she was?
A. No. I just noticed she was four or five points.
Q. You are just estimating the bearing; you did not take it on the compass?
A. No, I didn't; just estimating.
Q. Did you notice the officer observe the bearing of the vessel on the compass?
A. No, he didn't come over to look from the compass; I just remember him looking over with his glasses.
Q. Did he look at her over the compass?
A. Yes, looked at her.
Q. What did he do that for?
A. I don't know.
Q. Was he taking the compass bearing of her?
A. Well, I can't tell you; he just came over to the compass when she was getting close to us and turned around and looked over; I suppose he was taking a bearing.
Q. Did you at the time think he was taking a compass bearing?
A. I thought so.
215 Q. How far was she away at that time?
A. She was a long ways off then; I should think she must have been five miles.
Q. Do you know how your ship was heading at the time of the collision according to the compass?
A. East southeast.
Q. Did you see that on the compass?
A. Yes.
Q. Did you notice how the ship was heading on the compass when you got the order hard-a-port?
A. No.
Q. All you can tell is she was heading east by north and you got first an order to port, then an order to hard-a-port and, at the time of the collision she was heading east southeast?
A. Yes.
Q. You told Mr. Burlingham you thought she had swung under the port helm about a point before you got the order hard-a-port?
A. Yes.
Q. What do you base that thought on?
A. You might explain that a little more fully, please.
Q. You said you did not observe how the ship was heading at the time you got the order hard-a-port?
A. No, I didn't.
Q. What makes you think it was a point she had swung under the first port order rather than half a point or a point and a half or two and a half points?
A. Of course when you are standing at the wheel steering a ship and anything happens like that you just take it approximately looking at the compass and then at the ship; you don't notice exactly

COPY BOUND

how many degrees; you just happen to see a ship swinging and you look at the compass and see the point, but I didn't observe all these different things.

Q. You just estimated?

A. Yes.

Q. How far away do you think the ship was when you got
216 the order to port?

A. Probably about a mile as near as I can tell.

Q. Do you think it was as much as that?

A. Yes, it would be as much as that.

Q. As much as half a mile off when you got the order hard-a-port?

A. Yes, it would be half a mile off.

Q. Rather more or rather less, if anything?

A. Well, she would probably be about that.

Q. Did you put the helm hard over when you got the order?

A. Yes.

Q. How much had it been over theretofore?

A. Just a few spokes.

Q. How big is the wheel, a small hand-steering wheel?

A. Yes.

Q. How much do you have to roll it over to put it hard to port?

A. Three turns and two spokes.

Q. How much had you had it over on the first order?

A. About four spokes.

Q. Give it in degrees; you have a little indicator there?

A. Yes, but I never look at that.

Q. How long does it take the ship to swing a point with the helm ported four spokes?

A. She just comes slowly, very slowly.

Q. Very slowly?

A. Yes.

Q. Does it take as much as four minutes?

A. I wouldn't like to say about the time.

Q. Does it take more than a minute?

A. I can't say anything about time, because that is a thing I don't know.

Q. Have you any recollection at all as to how long it was from the time you got the first order to port until you got the second order, in time?

A. Less than a minute, I should judge.

Q. How are you able to fix that time and not the other minutes you have been asked about?

217 A. Because there are some things you might notice and others you don't; I am just telling what I took notice of.

Q. Have you made any statement about this occurrence to anybody?

A. No.

Q. Have you ever talked to anybody about it?

A. No.

Q. Did any lawyers ever take a written statement from you?

A. This gentleman here I was talking to him (indicating).

CLOSE IN CENTER

By Mr. Burlingham.

Q. It was done in Sunderland?
A. In Leith they did take a statement.

Cross-examination by Mr. Kneeland:

Q. Is Mr. Westgarth outside?
A. No.
Q. Has he spoken to you since he came out of here?
A. No.
Q. Not at all?
A. No, sir.

Redirect examination by Mr. Burlingham:

Q. Do you know where Newman, the man you relieved, is?
A. I think he lives in Ireland somewhere.
Q. When did he leave the ship?
A. When we paid off; the whole lot of them left that voyage.
Q. On arrival in Europe?
A. Yes.
Q. Where was Newman after you relieved him at the wheel; where did he go?
A. He was sousing the foremast, washing the paint.
Q. How high up was he on the mast?
A. I should think he was at the top of the rigging.

218 GEORGE HOGG, being duly sworn and examined as a witness for the Pomaron, testifies as follows:

By Mr. Burlingham:

Q. How old are you?
A. Forty-eight.
Q. Where do you live?
A. Gloucester, England.
Q. How long have you followed the sea?
A. Thirty-four years.
Q. What certificate do you hold?
A. Eighty-ton certificate, Australia on the coast, coasting certificate, master of small vessels.
Q. Are you on the Pomaron as boatswain?
A. Yes.
Q. How long have you been on her?
A. Eight months.
Q. Before that what boat were you on?
A. The Tangistan out of Swansea.
Q. You, of course, have had experience in sail as well as steam?
A. Yes.
Q. How long have you been in steam?
A. Fifteen or sixteen years.
Q. Before that in sail?
A. Yes.

COPY BOUND

Q. Deep sea vessels too?
A. Yes.
Q. Were you on watch on duty at the time of the collision?
A. Yes.
Q. How long had you been?
A. I am on duty all day.
Q. You sleep at night and on duty all day?
A. Yes.
Q. How much of a crew do you carry?
A. Six—five A. B.'s and an apprentice.
Q. And they are subject to your orders as petty officer?
A. Yes.
Q. What was the first you saw of the Alleghany?
A. I saw the Alleghany three or four points on the port
219 bow when I came on deck after breakfast.
Q. How far away was she?
A. I suppose she was between nine and ten miles away.
Q. Did you keep any watch on her?
A. No, sir.
Q. Didn't pay any attention to her?
A. Didn't pay any attention at all; was looking after the men at work.
Q. When did you notice there was any danger?
A. I noticed that there was danger when she was about a mile away, where I heard the chief officer blow the whistle.
Q. What did he blow?
A. One blast of the whistle.
Q. Where were you then?
A. On the lower bridge deck.
Q. Forward?
A. Yes, under the bridge.
Q. It is a well deck ship?
A. Yes, and I was on the bridge deck.
Q. Where these men appear on Exhibit 6, just below the bridge, is that the place where you were?
A. That is the bridge deck along there, yes.
Q. You heard your steamer blow one blast?
A. Yes.
Q. That attracted your attention to the other vessel?
A. I was watching the other vessel just before that, too; it didn't exactly attract my attention.
Q. You had been watching?
A. Yes, I was going forward and aft, watching the men working aloft painting.
Q. When one blast was blown what was the situation; was there any danger?
A. I should think there was danger if someone did not alter their course.
220 Q. Did she appear to be altering her course?
A. The Alleghany?
Q. Yes.

CLOSE IN CENTER

A. No.
Q. Did you get any signal from her?
A. He blew two blasts of the whistle just after we blew.
Q. Do you mean she replied at once?
A. No.
Q. How long a period?
A. It might be a minute, I dare say.
Q. Do you know whether any orders were given on your vessel after that?
A. No; I heard the telegraph ring down below; you could hear from the upper deck.
Q. When did you hear that, with reference to the two blasts of the Alleghany?
A. I heard just before the Alleghany blew.
Q. Just before the Alleghany blew you heard the engine telegraph?
A. Heard the telegraph ring below.
Q. How long before?
A. I suppose it might be—just after our whistle blew.
Q. Did your boat swing at all?
A. I couldn't tell whether our boat swung.
Q. Do you know what the other boat did; do you know whether she changed her course?
A. She altered her course, yes, sir.
Q. Under what helm?
A. Starboard helm.
Q. How do you know?
A. Her quarter swung across our bow.
Q. And the two vessels came together how?
A. The Alleghany's starboard side came across our bow.
Q. Did she stop her way at all?
A. No.
Q. Did you see any reduction in her speed?
A. None at all.
Q. Was she going as fast as you?
A. She is a faster boat than us.
221 Q. Was your way checked?
A. Our ship was nearly stopped as far as I could see.
Q. Where were your men at this time; Newman, where was he?
A. Newman was painting the foremast.
Q. Where was the other seaman?
A. The other man was painting the main mast.
Q. You had three in the watch?
A. Yes.
Q. And the apprentice counts one?
A. Yes, he was at the wheel.
Q. How was the weather at the time of the collision?
A. Fine weather.
Q. Any sign of snow or rain or hail?
A. No, sir.

COPY BOUND C

Cross-examination by Mr. Kneeland:

Q. How far away was the Alleghany when she blew the two whistles?
A. I should think nearly a mile away; three-quarters of a mile.
Q. At that time you felt the vibration of your engines in reversing?
A. I could feel the vibration of the vessel going astern when the engines reversed.
Q. That was before the Alleghany blew?
A. Yes.
Q. How long before?
A. I couldn't tell exactly; a matter of seconds, I suppose.

Cross-examination by Mr. Kirlin:

Q. How many whistles did you hear altogether?
A. From both vessels?
Q. Yes.
A. Three.
Q. What were they?
A. One blast from our ship and two blasts from the Alleghany.
Q. You heard no others?
A. No, sir.

222 JAMES LAVERACK, being duly sworn and examined as a witness for the Pomaron, testifies as follows:

By Mr. Burlingham:

Q. How old are you?
A. Twenty-two.
Q. How long have you followed the sea?
A. Eight and a half years.
Q. What certificate do you hold?
A. First mate.
Q. How long have you had it?
A. Sixteen months.
Q. You were second officer of the Pomaron at the time of the collision with the Alleghany?
A. Yes.
Q. Were you on duty?
A. No, sir.
Q. Where were you at the time of the collision?
A. I was asleep.
Q. Where are your quarters?
A. Right aft.
Q. What woke you?
A. The shock of the collision; I was just about dozing when she hit.
Q. Did you go out at once?
A. Yes, went right up.
Q. Where did you go?

CLOSE IN CENTER

A. On the break of the poop.
Q. Where was the Alleghany then?
A. Our bow was just in the break of his poop, right alongside of her then, touching.
Q. Was your boat moving ahead or going astern?
A. She was just about stopped; the engines were going astern.
Q. How do you know; could you feel the vibration?
A. Yes, sir.
Q. What were the engines of the Alleghany doing?
A. I don't know; I daresay they were stopped.
Q. Did the boats remain together or did they separate?
A. No, she went ahead; separated.
223 Q. Who went ahead?
A. The Alleghany.
Q. How far off did she go?
A. I couldn't say exactly; I went below then to get dressed.
Q. How was the weather when you came out on deck at the time of the collision?
A. Fresh breeze with moderate following sea, cloudy sky.
Q. How far could you see?
A. I couldn't say.
Q. There was no difficulty about seeing?
A. No difficulty at all; it was clear.
Q. Did you have any talk with the captain of the Alleghany?
A. No, only the last day when we arrived in Newport News.
Q. What was it?
A. He came aboard with a paper in his hand about a blinding snow storm; he said it would help a lot; I said, "It is sure to come out it was clear."
Q. Was this the captain of the Alleghany?
A. Yes.
Q. Not the chief officer?
A. Not the chief officer; the captain.
Q. Had you heard any talk or did you have any talk with the chief officer on the same subject?
A. I only heard him say in our engineer's mess room when we were at dinner.
Q. What did you hear?
A. He just pointed that out.
Q. What did he say?
A. He said it would be all right at the trial.
Q. What day was that?
A. The day we arrived here.
Q. What day?
A. Saturday.
Q. When was the conversation with the captain of the Alleghany?
A. Saturday afternoon.
Q. After the Pomaron had arrived here?
A. Yes.
Q. The captain of the Alleghany came on board the Pomaron again?

COPY BOUND C

A. Yes.

224 Q. Have you seen anything of the scrap log of the Pomaron?

A. No.

Q. Have you ever looked for it?

A. Yes, we looked for it but can't find it.

Q. When did you miss it?

A. Sunday morning.

ross-examination by Mr. Harrington:

Q. Did the blast from your ship wake you up before the collision?

A. I fancy I heard it, but I wasn't sure.

Q. How long do you think you had been asleep?

A. About three hours; my watch below was nearly up.

Q. You did not hear a two-blast signal from your ship?

A. No, the engines stopping in the collision woke me up; I was dozing.

Redirect examination by Mr. Burlingham:

Q. Did you hear any signal from either vessel?

A. I fancy I heard one blast, but I don't know for sure.

Q. From your vessel would that be?

A. I couldn't tell.

Cross-examination by Mr. Kneeland:

Q. Did you get out before the captain?

A. I was up on deck before he was.

Q. Did you have to go through the saloon to get up?

A. No, I am not forced to go through the saloon.

Q. Where are your quarters?

A. Right aft on the port side; the captain's on the starboard side.

Q. How do you go out?

A. I can go right out the bridge up the companion way.

Q. Did you see the captain when you went out?

A. No.

225 Q. Had he come out of his room??

A. I don't think so.

Q. When you got out on deck the vessels were together?

A. Yes, and the break of the poop was like that (indicating).

Q. Did you see when the captain did come out?

A. I was in dressing when he went up on deck.

Q. You had been up and gone down?

A. Yes.

Mr. Kneeland: In view of certain statements which have been made today with respect to the scrap log of the Pomaron I would like to have Mr. Smith state whether or not he or his firm have or ever have seen that scrap log?

Mr. Smith: We have never seen or heard of it until today.

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Mr. Burlingham: In view of the fact that neither Mr. Kneeland nor Mr. Harrington has yet filed any libel in the case I would like to ask whether they have any other or different allegations to make than those contained in Mr. Kirlin's libel.

Mr. Kneeland: Yes; we shall refrain from all charges that the vessel was proceeding through snow.

Mr. Harrington: So shall we.

Mr. Kirlin: I shall withdraw what is in my libel about snow; I should like to ask Mr. Burlingham to state what the defense to my libel is, no answer having been filed.

Mr. Harrington calls for the production of the report made by the officer of the British Board of Trade, or the production of an authenticated copy thereof.

226 YANG-TSZE EXHIBIT No. 12.

1-13-13.

(In 7309 Facsimile Copy.)

Inq. 1.

Issued by the Board of Trade.

Examination on Oath Relating to the S/S Pomaron.

In pursuance of the 465th Section of The Merchant Shipping Act, 1894, 57 and 58 Victoriae, Cap. 60.

1. Names of deponent at full length.

1. JAMES GRIFFITHS, being duly sworn, deposes as follows, namely:

2. State whether deponent is "Master," "Mate," etc., of the ship, the name of the ship, and particulars as to her tonnage and official number.
If the ship is a steam ship, the fact should be stated, as well as the nominal horse power of the engines, and whether paddle or screw.

2. That he is Master of the Ship Pomaron of the Port of West Hartlepool of the Register Tonnage of 1,127 Tons, her Official Number being 124345.

Screw Steamer 148 H. P.

3. Names and residence of owners.

3. That the said Ship is owned by Furness, Withy & Co. Ltd. residing at West Hartlepool in the of

4. Particulars of rig, build, age, and class of ship.

4. That the said Ship is rigged as a Schooner that she was built of Steel at Grangemouth in the year 1907, and that she is classed in British Corporation as A-1 100 years.

COPY BOUND C

5. Particulars as to the number of hands composing crew, and as to the certificate of deponent.

5. That the Crew consist of 23 hands, including deponent; that the deponent's Certificate is a Certificate of competency, and is numbered 033 566.

6. Particulars of cargo, and shippers and consignees.

6. That the said Ship had on board a Cargo of General goods of the weight of 2500 tons, shipped various shippers of Baltimore and consigned to order of Leith.

7. Number of passengers on board. Note: If the wife and children of the master or any officer of the ship are on board, the fact should be stated.

227 7. That the said Ship had on board in addition to the Cargo aforesaid no Passengers.

8. Draught of water at time of sailing.

8. That the draught of water of the said Ship was 16 feet 3 inches forward and 16 feet 4 inches aft.

9. Date and hour of sailing, and state of tide, weather and wind.

9. That said Ship proceeded from Baltimore on her intended voyage as named below, on the 1st day of Feb. last past, at 7 A. M.; the tide at the time being the weather , and the wind blowing from the

10. Any statement as to the condition of hull and cargo of the ship, or of her equipments, life saving appliances, etc., at the time of sailing.

10. That at the time of sailing as above the said Ship was well found in every respect and in good condition.

11. Limits of intended voyage.

11. That the said Ship was bound for Leith in Scotland.

12. Statement as to the voyage previous to the casualty.

12. That the said Ship proceeded on the said intended voyage as above stated and on the 2nd Feb. at 5 A. M. Deponent went below leaving the 2nd Officer in charge. Deponent had been on deck from the time of leaving Baltimore until then. The weather was fine and clear when he went below.

13. Particulars of the casualty, commencing with the date and hour, and the state of the tide, wind, weather and sea.

13. That on Friday the 2nd day of February at about 11.20 A. M.; the tide at the time being xxxxxxxxxxxxx (Init'd) J. G. the weather fine & clear, and the wind in the West North West blowing a moderate breeze with a moderate sea from the West. xxxxxxxxxxxxx Deponent was awakened by the Steward calling him and at once went on the deck. As he came out of his berth he felt the shock of the collision and

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228 on getting on the Bridge he found the Chief Officer there in charge and the Apprentice Hyslop at the wheel. He saw another steamer which proved to be the German Steamer Alleghany near to on the Port bow. He ordered the boats to be swung out and the damage to be ascertained. When he came on the bridge the engines were working astern and the ship's head was about South. The mate stopped the engines. It was reported to Deponent that the vessel was making no water in the Holds but that her Port bow was badly damaged. He then signalled to the Alleghany asking if any assistance was wanted. The Alleghany replied "do not abandon me" and deponent stood by. Very soon afterwards the Alleghany went full speed ahead; heading W. N. W. and the Pomaron followed her. About 2 hours after he noticed that the Alleghany had stopped and seemed to be settling down aft and upon getting close to her, it was found that her boats with all her crew and passengers in them were in the water. Deponent stopped and picked them all up. He then asked the Captain of the Alleghany if there was anything else he could save. He replied that it would be madness to send anyone aboard then as the water was up to the after deck when they left her. Deponent stood by the Alleghany until 3.20 P. M.; when she sank stern first.

(Init'd) J. G.

14. Statements respecting services rendered, if any.

14. That in Lat. 37 N. and Long. 74.4 West he then proceeded for Newport News at full speed, arriving there at 6 A. M. the following morning xxxx (Init'd) J. G.

15. Such other matters or circumstances relating to the ship or cargo as the officer thinks necessary.

229 15. That the damage to the Pomaron was the stem broken and twisted several plates damaged and Port anchor lost. The damage extended right down to the forefoot. Permanent repairs were made at Newport News. There was no water in the holds, but the fore peak was full to the water level.

16. Loss on ship and cargo, and amount of insurance on ship, cargo, and freight.

16. That the loss on the said Ship cannot be estimated by Deponent at Pounds Sterling, and on the said Cargo at can't say if any damaged Pounds Sterling, the Cargo in can't say Pounds Sterling, and the Freight in can't say Pounds Sterling.

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17. Particulars of lives lost and saved, etc.

17. That in consequence of the collision the said Ship no lives were lost by.....the remainder 23 in all, viz., Master, and 22 Crew† and no Passengers, xxxxxxxxxx by remained aboard, and subsisted on board that vessel from the ..... to the ....., when they were landed at ..... That following provisions, valued at .....; were transferred from the wreck to the salving vessel ..... The entire crew and passengers of the Alleghany viz. 48 crew and 3 passengers were taken aboard the Pomaron and landed at Newport News as stated.

18. Cause of the casualty, etc.

18. That, in deponent's opinion the cause of the casualty was the Alleghany trying to cross the Pomaron's bows and it might have been avoided by.....

230 19. That the above contents are in all respects correct and true to the best of deponent's knowledge and belief.

(Sgd.) JAS. GRIFFITHS,
Deponent.

Sworn at Leith this 12th day of March 1912 before me,

(Sgd.) HUGH D. McEWEN.
xxxxxxxxxxxxxxxxx
xxxxx *Officer* xxxxxxxxxxxxxx.*

*Obliterate the words that do not apply.

Person appointed for the purpose by The Board of Trade under Sec. 465 of M. S. A., 1894.*

†In the number of the Crew should be included all Officers except the Master.

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YANG-TSZE EXHIBIT No. 12A.

(In 7309 Facsimile Copy.)

Inq. 1.

Issued by the Board of Trade.

Examination on Oath Relating to S/S Pomaron.

In pursuance of the 465th Section of The Merchant Shipping Act, 1894, 57 and 58 Victoriae, Cap. 60.

1. Names of Deponent at full length.

231 That WILLIAM ARMSTRONG WESTGARTH, being duly sworn, deposes as follows: namely, 5 High St. Normandy Yorkshire.

2. State whether Deponent is "Master," "Mate," etc., of the ship, the name of the ship, and particulars as to her tonnage and official number.
If the ship is a steam ship, the fact should be stated, as well as the nominal horse power of the engines, and whether paddle or screw.

2. That he is Chief Officer of the Ship Pomaron of the Port of West Hartlepool of the Register Tonnage of 1127 Tons, her Official Number being 124345.

3. Names and residence of owners.

3. That the said Ship is owned by Furness Withy & Co. Ltd. residing at West Hartlepool in ..... of .....

4. Particulars of rig, build, age, and class of ship.

4. That the said Ship is rigged as a Schooner that she was built of steel at Grangemouth in the year 1907, and that she is classed in British Corporation xxxxxx as ..... years.

(Init'd W. A. W.)

5. Particulars as to the number of hands composing crew, and as to the certificate of deponent.

5. That the Crew consisted of 23 hands, including deponent; that the deponent's Certificate is a Certificate of competency as Master, and is numbered 003398.

6. Particulars of cargo, and shippers and consignees.

6. That the said Ship had on board a Cargo of General goods ..... of the weight of 2500 tons, shipped various shippers Baltimore and consigned to order of Leith.

7. Number of passengers on board. Note: If the wife and children of the master or of any officer of the ship are on board, the fact should be stated.

7. That the said Ship had on board in addition to Cargo aforesaid no Passengers.

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8. Draught of water at time of sailing.

8. That the draught of water of the said Ship was 16 feet 3 inches forward and 16 feet 4 inches aft.

9. Date and hour of sailing, and state of tide, weather and wind.

9. That said Ship proceeded from Baltimore on her intended voyage as named below, on the 1st day of February last past, at 7 A. M.; the tide at the time being ..... the weather ....., and the wind blowing ..... from the .....

232

10. Any statement as to the condition of hull and cargo of the ship, or of her equipments, life saving appliances, etc., at the time of sailing.

10. That at the time of sailing as above the said Ship was well found and in good condition.

11. Limits of intended voyage.

11. That the said Ship was bound for Leith in Scotland.

12. Statement as to the voyage previous to the casualty.

12. That the said Ship proceeded on the said intended voyage as above stated .....

13. Particulars of the Casualty, commencing with the date and hour, and the state of the tide, wind, weather and sea.

13. That on Friday the 2nd day of February at 10.35 A. M.; the tide at the time being .....; the weather fine and clear, and the wind in the West North West blowing a moderate breeze with a moderate sea from the West, the said Ship was in 37.26 N. Lat. and 73.42 W. Long. Deponent was in charge on the upper bridge and apprentice John Hyslop was at the Steam Steering Wheel also on the upper Bridge. The deck watch was employed painting the fore and main masts the boatswain was also on deck looking after the men who were painting the masts—a thoroughly good lookout was kept by deponent. The ship was steering E. by North ¼ North magnetic and the Engines were at full speed say 9 knots, Deponent saw a steamer which proved to be the "Alleghany" of Germany about 3 or 4 points on the Port bow heading about South ¼ West about 10 to 12 miles distant. Both vessels kept their courses and approached each other; the Alleghany going about 13 knots an hour. At 11.14 A. M. Deponent blew one short blast the vessels then being about a mile apart and still on the same course.

233

After about a minute the Alleghany replied with 2 short blasts and immediately after Deponent noticed that the Alleghany was swinging on her starboard helm. Immediately deponent heard the two blasts he reversed the en-

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gines full speed as he saw that the Alleghany was too close to pass across his bows safely, he did not then sound his whistle. The Alleghany continued to come ahead at high speed still swinging on her starboard helm and the vessels came in contact. The starboard side of the Alleghany struck the Pomaron's port bow. The part of the Alleghany that was in contact with the Pomaron was the starboard side abreast of No. 3 hatch. The Alleghany swung clear and passed ahead. There was very little way on the Pomaron which was swung round to starboard by the collision. Deponent kept the engines going astern for 4 or 5 minutes after the collision and then stopped them. The Alleghany also stopped and lay about a mile off the Port hand. The Master came on deck immediately after the collision and took charge and Deponent examined the damage. Generally he found the stem twisted around to the Starboard side.

14. Statements respecting services rendered, if any.

14. That.....several plates on both bows were broken the greatest damage being on the Port bow. The forepeak was full of water. The vessel was open from 6 inches to 1 foot as far as deponent could see under the water. Immediately the Pomaron's damage was ascertained the Alleghany was signalled whether she required any assistance and Deponent understood that she required assistance and the Pomaron stood by.

15. Such other matters or circumstances relating to the ship or cargo as the officer thinks necessary.

234 15. That.....
....immediately afterwards the Alleghany went full speed ahead towards the land and the Pomaron followed heading W. N. W. About ¼ past 2 the Pomaron had overhauled the Alleghany which had stopped. She was settling down by the stern and all her crew and passengers were in her boats. They were all taken aboard the Pomaron 51 in all and the Pomaron stood by the Alleghany until 3.20 P. M. the same day when she sank in Lat. 37.33 N. xxxxxxxxxx 74° 4′ W. Long. The
(Init'd) W. A. W.
Pomaron ran for Newport News where she arrived on the 3rd Feb. at 6 A. M.

16. Loss on ship and cargo, and amount of insurance on ship, cargo and freight.

16. That the loss on the said Ship cannot be estimated by Deponent at ..... Pounds Sterling, and on the said Cargo at can't say Pounds Sterling, and that the Ship was insured in the sum

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of can't say Pounds Sterling, the Cargo in can't say Pounds Sterling, and the Freight in can't say Pounds Sterling.

17. Particulars of lives lost and saved, etc. When deponent blew the single blast at about 11.14 A. M. he ported his helm a little and the only signals made by the Alleghany were the two blasts blown in answer to this single blast. (Init'd) W. A. W.

17. That in consequence of the collision with the said Ship no lives were lost by ..... the remainder 23 in all, viz., Master, and 22 Crew† and no Passengers, xxxxxxx by remained aboard

(Init'd) W. A. W.

....., and subsisted on board that vessel from the ..... to the ....., when they were landed at ..... The following provisions, valued at ....., were transferred from the wreck to the salving vessel ..... The Passengers and Crew of the Alleghany were landed at Newport News.

18. Cause of the casualty, etc.

235 18. That, in deponent's opinion, the cause of the casualty was the failure of the Alleghany to comply with the rule of the road. xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.....
.....

19. That the above contents are in all respects correct and true to the best of deponent's knowledge and belief.

(Sgd.) W. A. WESTGARTH,
Deponent.

Sworn at Leith this 12th day of March 1912 before me,

(Sgd.) HUGH D. McEWEN,
xxxxxxxxxxxxxxxxx *Coastguard.**
xxxxxxxxxxxxxxxxx.*

*Obliterate the words that do not apply.

Person appointed for the purpose by the Board of Trade under Sec. 465 of M. S. A., 1894.

†In the number of the Crew should be included all Officers except the Master.

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236 YANG-TSZE EXHIBIT No. 14a.

1-13-'13.

U. S. District Court, Southern District of New York.

YANG-TSZE INSURANCE ASSOCIATION, LIMITED, et al.
v.
FURNESS, WITHY & COMPANY, LIMITED,

And — Other Cases Arising Out of the Collision Between the British Steamship Pomaron and the German Steamship Alleghany, February 2nd, 1912.

It is hereby stipulated, for the purpose of the trial of these cases and in order to obviate the delay necessary to the issuance of a commission to take the testimony of the Master and First Officer of the German Steamship "Alleghany," that the following statements may be received in evidence at the trial of these cases as evidence of the facts herein contained:

Statement of Captain Metzenthin:

"I was master of the German Steamship Alleghany at the time of her collision with the steamship Pomaron. The first officer was on watch. I was first made aware of the danger of collision by hearing the whistle signal. When I saw the Pomaron he was
237 quite close to and a collision unavoidable. I have had the first officer on board with me for quite a long time, and he has always proved trustworthy. The sinking of the Alleghany was due to the engine room bulkheads not holding."

Statement of First Officer Kurt Morens:

"I was first officer of the Alleghany at the time of her collision with the steamship Pomaron. I was on watch on the bridge and was engaged in taking observations. I had a free outlook, but, as I must admit, had for some time neglected to look to the starboard side where the other steamer came. I thought that on the English steamer the bridge was unoccupied and that an officer first came on to it shortly before the collision. But I cannot absolutely confirm that. I know that it was my duty to keep out of the way. I omitted during a period of about three-quarters of an hour to keep a lookout to starboard, and therefore never noticed the Pomaron crossing my course until the latter gave a signal to keep clear and had already approached so near that a collision was unavoidable. There was no lookout man at the time and the steersman's lookout, to starboard, was blocked by a wind screen. For a long period of time I neglected to keep a lookout, and therefore first saw the crossing steamer Pomaron only at the last moment. My excuse is that I was engaged in making observations. No

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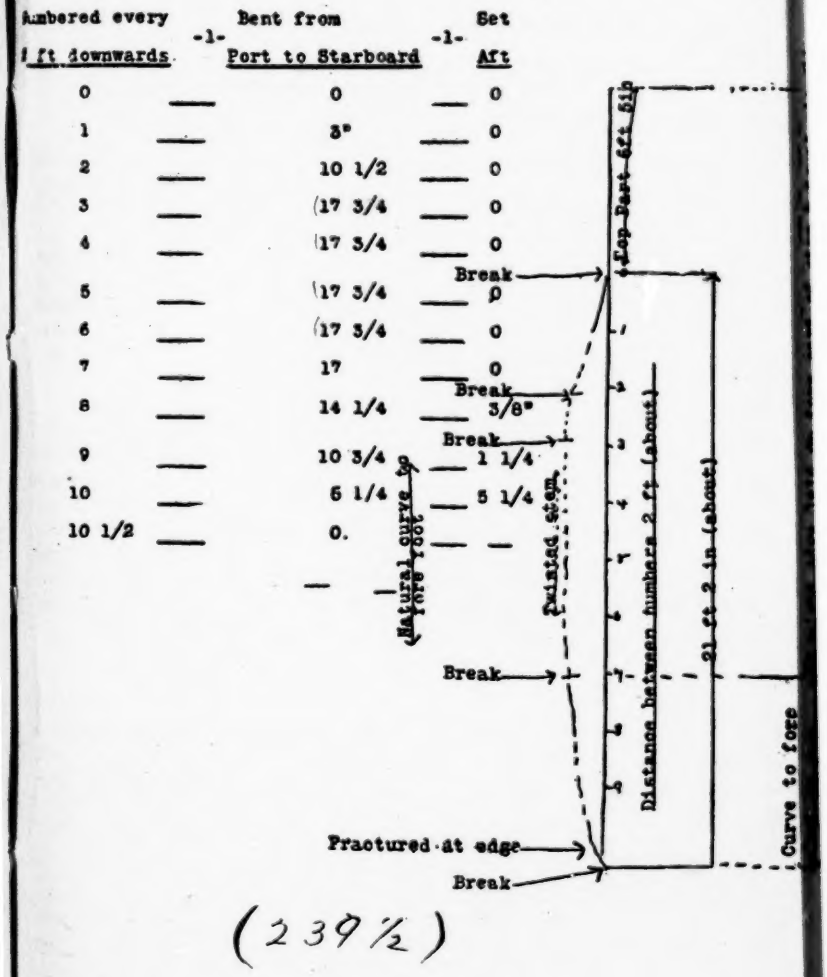

(239½)

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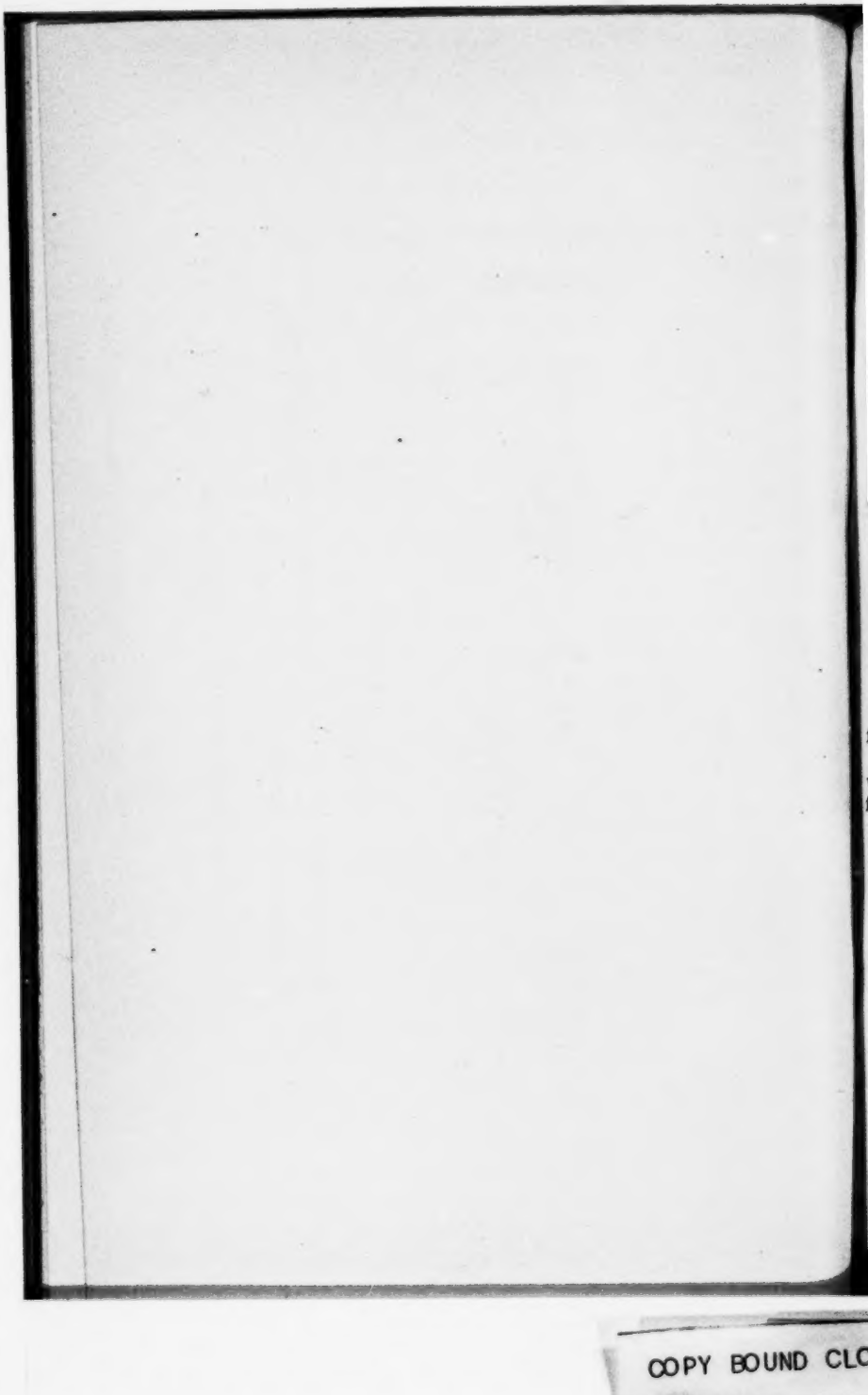

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commands were given to the steersman of the Alleghany.
238 After the collision we went full speed astern until the vessel stopped."

Dated, New York, January 6th, 1913.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for the Pomaron.
CONVERS & KIRLIN,
Proctors for Yang-tzse Ins. Co. et al.
HARRINGTON, BIGHAM & ENGLAR,
Proctors for Various Cargo Claimants.
WILLIAMS & STEVENSON,
Proctors for Boston Insurance Co.
KNEELAND, HARISON & HEWITT,
Proctors for Federal Insurance Co.
HENRY A. WISE, *United States Attorney.*

239 POMARON EXHIBIT No. 1.

June 7, 1912.

Feb., 1912.

Particulars of Broken Stem of S. S. "Pomaron."

Broken top part is 6 ft. 5 ins. long, and perfectly straight.
Lower part having fine breaks in it 21 ft. 2 in. long and is bent from Port to Starboard.
The following are the measurements taken of the lower part when the damage plates were attached showing the bend of the stem from Port to Starboard.

(Here follows diagram marked page 239½.)

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240 RESPONDENT'S EXHIBIT A.

Of January 13, 1913.

(Containing Yang-tsze Exhibit 13.)

United States District Court, Southern District of New York.

YANG-TSZE INSURANCE ASSOCIATION, LIMITED, et al.
vs.
FURNESS, WITHY & COMPANY, LIMITED,

And — Other Cases Arising Out of the Collision Between the British Steamship Pomaron and the German Steamship Alleghany, February 2nd, 1912.

It is hereby stipulated for the purpose of the trial of these cases, that the annexed copy of extracts from the Day Book or Log of the German Steamship Alleghany are true copies of parts of said Log Book, and may be put in evidence on the trial of these cases by either party.

Dated, New York, January 8, 1913.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Pomaron.

CONVERS & KIRLIN,
Proctors for Yang-tzse Ins. Co., et al.

241 HARRINGTON, BINGHAM & ENGLAR,
Proctors for Coleman and Other Cargo Claimants.

WILLIAMS & STEVENSON,
Proctors for Boston Insurance Co.

KNEELAND, HARISON & HEWITT,
Proctors for Federal Insurance Co.

HENRY WISE, *United States Attorney.*

(Translation.)

Log of Alleghany.

Title Page:

Hamburg-American Line.

Log of the German Steamship Alleghany. Home Port Hamburg. Signal R. M. D. P. Captain Th. Metzenthin. Gross Measurement 2494 Tons, Net 1606 Tons.

This Book contains 150 numbered pages, each of which is intended for one day. There are in it printed rules for the keeping of the log, and there are contained in it blanks for recording births and deaths on the ship during the voyage, as well as some samples for such records. In the back of the book there are added blanks for the birth and death register.

Page 85, left hand of page

1912, 2nd of February, Log of the SS. Alleghany on 133rd Voyage from New York to Inagua

1 Hrs in the Mng.	2 Wind	3 Force	4 Weather	5 Barometer	6 Thermometer Air	6 Thermometer Water	7 Course by Compass	8 Drift	9 Total Variation	10 Variation Chart	11 Deviation	12 True Course	13 Miles	14 Water in Pumps	Depth of Water Soundings and Character of Gr
1	WSW	3	ptly cloudd				S 8°w		6°w			S 2° W			
2	"	4	"				"		"			"			
3	"	"	"				"		"			"			
4	"	"	"	29.77	36	38	"		"			"	40	empty	
5	WSW	4/5	"				S 7°W					S 2° W			
6	"	"	"				"	ø	5°w	7,5w	2,50	S 2° W			
7	"	"	"				"		"			"			
8	"	"	"	29.77	40	48	"		"			"	46	empty	
9	W	5					S 6°W	ø	4°w	7,5 w	2,50	"			
10	"	"					"					"			
11	"	"					"					"			
12															

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From Barnegat, Latitude left 39°46' N.--Long. 73°56'W

Ex. No. 13
1 - 13 - '13

242 This log was begun on October 19th, 1911 and was closed on —.

Page 84:

Thursday, the first of February, 1912.

Crew accomplished ordinary routine of work. 3 hrs. 30 min. cargo on board ship. Draft forward 20'6"—aft 22'.

The cargo taken on in New York was stowed away in good shape by experienced men under the constant supervision of officers and well protected and covered. Before loading was begun all bilges and sieves, and also the drains were overhauled and, when necessary, cleaned. Safety appliances and fire-apparatus inspected, and found in good order. Ship in perfectly seaworthy condition. The crew complete and healthy. All the outboard-ports and bulkheads were watertight. Lifebelts of the crew inspected. All hand-pumps were in good order. The side-lights were adjusted, and put into proper position.

(Signed) TH. METZENTHIN.
MORENZ, *1st Officer.*

6.50 passed quarantine station.
8.00 pilot discharged.
8.15 (Chr. 1 hr. 18 min.) Beginning of Voyage.
Compass Course: S. 6° W.
9.50 a. m. passed Sea Girt Light 4½ miles off.
Calm Sea.
11.52 passed Barnegat, 8½ miles off.

(Here follows table marked page 243.)

244 On the right-hand page are the following entries:

Occurrences and Remarks.

Compass Course:

From 1- 4 South 6° West, 30, Light Sea.
" 5- 8 South 5° West, 76, Moderate Sea.
" 9-12 South 4° West. Considerable swell.
Chronometer 5.7.0.

Then follows this entry:

On the 2nd of February, on the voyage from New York to Inagua, at 37° 32′ North latitude and 74° West longitude, at 11.15 a. m., the English steamship Pomaron, of West Hartlepool, struck with her bow the Alleghany on the starboard side between hatches 3 and 4. Sounded at once; found 12½ feet of water in No. 3 hold. No. 4 was dry.

All the pumps were started immediately, and the life-boats cleared, supplied with food and supplied with cork-jackets. In the beginning it seemed as if we could hold our own against the water in the hold as we had found the same water-level a number of times. Suddenly the water rose very fast and towards 12 o'clock hold 3 was filled and at the same time there was water in hold No. 4, which filled just as fast. The steamer Pomaron was notified through flag-signals to stand by. From 11.40 a. m. we steered N. 60° to reach the coast if possible. The engine worked full speed. The Pomaron followed us. The First Engineer announced at 1.20 that the bulk-head door between hold 3 and the engine room had given away allowing the water to rush into the engine room. Realizing that the ship could not be held with the pumps we drew the fires at 1.45 p. m., opened the safety valves, ordered the crew and the passengers into the boats and lowered the boats into the water. At 1.50
245 the boats left the ship, the sea flooding the after deck by that time. All the passengers and crew had been rescued and transferred on board the Pomaron by 2.50. Two boats were smashed against the side of the ship after the people had gotten out safely. The other two were hoisted up. The Pomaron remained in the vicinity of the Alleghany until the ship sank at 3.15 at 37° 42′ North latitude and 74° 22′ West longitude. Thereafter the Pomaron set her course for Newport News. The Pomaron had received serious damage at the bow, yet her holds did not leak. At the time of the collision the weather was clear, the wind West, force 5, the sea high and rising. First Officer Morenz was on watch, the Quartermaster Ramitz at the wheel. The first officer was engaged in taking observations of the sun and had just gone into the chart-house to note the measured latitude when he heard two short blasts of a steam whistle. He ran out immediately and saw the steamer about 5 points from forward close by the starboard side crossing our course. Realizing that he could not clear her by porting, he gave two short whistles and also put the helm ha

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astarboard. The engine telegraph was put twice full speed ahead, but the collision was unavoidable, as the steamer was too close to the Alleghany. After the collision the telegraph was put full speed astern, and when the ship had stopped the engines were stopped. The First Officer, Morenz, says that he, in observing the sun on the port side, had overlooked the approaching steamer on the starboard side. The Quartermaster Ramitz, did not see it either. I myself was in the cabin at that time and ran on deck as soon as I heard the two whistles. I saw her heading directly at us
246 about amidships. I called to the other steamer to go full speed astern; after that the officer on the bridge put his telegraph that way. A few seconds after that the collision took place.

Immediately after the collision a telegram was sent to the Hamburg-American Line in New York advising them of the accident. The saving of the men was successful, and without any extraordinary occurrence. The crew behaved well. Their personal belongings were not saved.

On board SS. Pomaron, February 2nd, 1912.

(Signed) TH. METZENTHIN, *Captain.*

Translation Log SS. Alleghany page 86 at bottom.

Additional:

I hereby certify that the Log-Book is closed, and that same must not be used hereafter.

Newport News, Va., February 3rd, 1912.

Imperial German Vice-Consulate.

[L. S.] (Signed) HENRY L. SCHMITZ.

247 United States District Court, Southern District of New York.

THE FEDERAL INSURANCE COMPANY
against
FURNESS, WITHY & CO., LTD.

EUGENE J. F. COLEMAN and Others
against
FURNESS, WITHY & CO., LTD.

NORD-DEUTSCHE INSURANCE CO.
against
FURNESS, WITHY & CO., LTD.

YANG-TSZE INSURANCE CO., LTD., et al.
against
FURNESS, WITHY & CO., LTD.

Opinion.

This is a suit in admiralty arising out of a collision on the high [illegible] on February 2nd, 1912, at about half past 11 in the forenoon,

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some 100 miles off the Chesapeake Capes, between the steamer Alleghany (sic) and the steamer Pomaron. The libellants in the case represent the cargo of the Alleghany, which was sunk by the collision, and the suit is between them and the owners of the Pomaron.

The weather was clear, the wind and sea moderate. The
248 Alleghany, an ordinary tramp steamer, 310 feet long, had left New York the previous night, bound for the West Indies, and was then on a course south two degrees west true, at a speed of almost exactly 11½ knots an hour. The Pomaron, a similar steamer, 278 feet long, had left Baltimore February 1st at 7 A. M. and was on a course east nineteen degrees north true, at a speed of about nine knots. The collision occurred about 110 miles outside of Cape Henry in 37 degrees 26 minutes North and 73 degrees and 42 minutes West. These facts are all conceded. From them it results that the angle between the courses of the vessels was 111 degrees. The Pomaron sighted the Alleghany at about 10:30, some ten or twelve miles away on her port hand, the exact bearing being one of the points in dispute. Each vessel kept her course and speed for about 45 minutes. During that time the chief officer of the Pomaron had constantly observed the Alleghany, and taken her bearing roughly over his compass, which he made about northeast. The Alleghany had not, however, seen the Pomaron at all. This was due to the fact that the chief officer, then on watch, had taken his observation and gone into the chart room to calculate his position. As the wind was from the west, there were dodgers upon the starboard end of the Alleghany's bridge, and either these or the situation of the quartermaster at the wheel, prevented him from seeing off on his starboard hand. No lookout was kept, and the quartermaster was steering by a course, the result being that the Alleghany did not see the Pomaron until the Pomaron herself blew. The Pomaron's chief officer, Westgarth, kept his course and speed, as required by

the 21st article of the International Rules, until a time which
249 he places variously between five and seven minutes of the collision. Then he blew one blast and directed his quartermaster to port his wheel a little. The only testimony of the amount of this porting comes from the testimony of Westgarth and the quartermaster, which shows that at the end of the time the ship had changed her heading one point to starboard. They and the boatswain place the period at one minute. Meanwhile the Alleghany had kept her course and speed unaltered, although the giving-way vessel. At the end of the period, whatever it was, the Alleghany blew two blasts, and put her wheel hard-a-starboard. At that moment, or soon thereafter, the Pomaron hard-a-ported and telegraphed to her engine room, "full speed astern." This order was executed in the engine room in about half a minute, perhaps less, as her engineer testified, and she continued under reversed engines until the collision. The time between the reversal of the engine and the collision is stated by the engineer to have been three minutes and a half. This he says he observed upon the clock in the engine room opposite which he faced. Both the chief officer and the quartermaster agree that the time between the Alleghany's whistle

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and the collision was four minutes. All the Pomaron's crew agree that the Pomaron had very greatly diminished her speed. The captain of the Alleghany, who had come on deck, says that the Pomaron had not reversed until the vessels were near enough for him to shout to Westgarth to do so, at which time he put over his telegraph. At the time of the collision the vessels had changed their headings considerably. The only testimony upon this
250 point is given by Westgarth, who says that the Alleghany was headed southeast by south and the Pomaron east southeast, but that the angle of collision was four points. The bow of the Pomaron struck the starboard quarter of the Alleghany somewhere between hatches 3 and 4, not less than 100 feet from the stern. The latter was under full speed, and she went on past the Pomaron until her engines were reversed and she stopped. Being badly damaged, she put about for Norfolk, but was found to be in sinking condition a few hours afterwards and her passengers and crew were taken on the Pomaron, which then stood by until the Alleghany sunk, at about 3 o'clock.

Kneeland, Harison & Hewitt, Esqs., (Lawrence Kneeland), for Federal Insurance Co.

Harrington, Bigham & Englar, Esqs. (Howard S. Harrington), for Eugene J. F. Coleman, et al.

Convers & Kirlin, Esqs. (J. Parker Kirlin and Wm. H. McGrann), for the Yang-tsze Insurance Association and Nord-Deutsche Insurance Co.

Henry A. Wise, Esq., and A. S. Pratt, Esq., for United States of America.

Burlingham, Montgomery & Beecher, Esqs. (Charles C. Burlingham, R. Leech and B. W. Wells), for respondent.

HAND, *D. J.*:

The libellants charge three faults against the Pomaron: first, that the vessels are not shown to have been in risk of collision; second, that the Pomaron changed her course before the time mentioned in the Note to Article 21; third, that her maneuvres
251 in extremis directly brought her into collison. I have found the case extremely complicated in the facts, but I believe that a sufficiently painstaking analysis of the testimony admits of more certainty than at first appears to be possible. Most of my conclusions as to the distance and bearing of the vessels at different times can be proved by the use of a simple logarithmic table together with the theorem that the sides of a triangle are in proportion to the sides of the opposite angles, but I have not appended the details of the calculations, as they can be easily verified.

The first question to determine is whether the situation was one actually involving risk or collision. This the Rules define as one in which the bearing does not appreciably change. We know that the constant bearing which would have brought them into collision, was almost exactly 39¼ degrees, or 3½ points. However, the constancy of the bearing applies only at substantial distances; thus,

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when the vessels were a half-mile apart, the Alleghany might have opened one-half a point and yet when the Pomaron's stern crossed the Alleghany's course the Alleghany's bow would have been only 164 feet away, much too close a shave. At half a mile apart the Alleghany was in that event 1,995 feet from the point of crossing, and the Pomaron 1,156. If, on the other hand, the Alleghany had closed one-half a point at a distance of half a mile, the Alleghany's stern would clear the Pomaron's course when the latter's bow was only 170 feet away, also too close a shave. In that case the Alleghany would have been 1,566 feet from the intersection and the Pomaron 1,637 feet. Even if the Alleghany had opened a full point, still the Pomaron would have been justified in regarding the case as one involving risk of collision, for her stern would
252 have cleared the Alleghany, a course when the latter was only about 680 feet away; and that, in the case of two vessels of the length of these, and moving at their speeds is no more than enough leeway to allow for incorrect estimates of distance and speed. The distances in that case would be respectively 2,182 feet and 897 feet. As nearly as the vessels can be placed from the testimony it will appear that the Alleghany, after the Pomaron blew was at least as far away as the Pomaron from the intersection of their courses, and not more than 1,000 feet further. At that time, therefore, there was a risk of collision and there could not therefore have been appreciably more than half a point of variation in the bearing from that absolutely constant bearing which would have brought their bows in collision, and which must have existed up to that time. I therefore find that whether or not Westgarth's observation of "about" northeast was careful enough (it was actually N. E. ¾ N.), the bearing had been in fact substantially constant, that there was in fact risk of collision within the meaning of the Rule, and that he was justified in maneuvering on that assumption. It seems hardly worth while further to elaborate the reality of a danger which everybody who was present thought imminent and certain before the Pomaron backed, and which was at once realized.

The next fault alleged against the Pomaron is her initial porting when the vessels were about one mile apart. This everyone agrees was before the period had arrived under the Note to the Twenty-first Article, after which the Alleghany could not alone avoid collision. Under all the authorities it was a clear violation of the rule and imposes on the Pomaron the duty of showing that it
253 could not have contributed to the disaster. The facts are that the Pomaron blew once and ported slightly, that the Alleghany thereupon awoke, her chief officer ran out of the chart room, thought at a glance that it was too late to port, blew two blasts and hard-a-starboarded; that, when the Alleghany blew twice, Westgarth hard-a-ported and gave the order to reverse, and at the end of half a minute did get his engines in reverse till the collision. First, I have to find out how long a time elapsed between the two signals. Westgarth first put it in the log as three minutes, but later he, Hyslop and Hogg put it at one minute. He further said that the vessels had moved from one mile apart to one-half, during

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period he was under this initial helm. If the angle was 39¼ degrees, the distance covered by the Pomaron while the distance apart decreased from one mile to one-half was 1,400 feet, which she would cover in about one minute and a half. Again, consider that although Hyslop, who best knew, says that the helm was not steadied, the total change in direction was only one point. It is hardly possible that a vessel of the Pomaron's size should travel over ten lengths under any change of helm at all and make no more change than one point. The surest way to judge of this is, not to take the witness' estimate of time or distance, but to consider the situation: The Alleghany's chief officer heard the Pomaron's signal in the chart room and at once ran out; he was alarmed by it and its discovery of him off duty. We must assume that he used all possible haste and took no long time to determine what he would do; the occasion permitted no reflection. When he decided, he answered by two long blasts and put over his wheel. To suppose that this
254 took more than a minute appears to me extremely unlikely and unreasonable; to assume it took a full minute is indeed doubtful. That it should have seemed a long time to Westgarth and Hyslop is reasonable, while they were being forced to hold that most trying of positions, a holding-on ship's, while the giving-way ship continues on her course and speed closer and closer. Therefore I find the shorter estimate to be the correct one.

The question still remains whether the Pomaron can show that this initial porting could not have produced the collision. In order to know this we must ascertain what actually happened after the Alleghany blew and put over her helm hard-a-starboard. I think it must be conceded that the Alleghany's story is true that the helm was put hard over substantially at the same time as the whistle was blown; to suppose any real delay is impossible and no one suggests it. The speed was, if anything, increased, for the telegraph was twice put full speed ahead. Moreover, we know from Westgarth—and there is no reason to suspect it—that the Alleghany, when struck, had starboarded not more than three or three and a half points. Westgarth puts her at southeast by south. If so, her stern had not yet left her course and she had not at most travelled more than three lengths, or 930 feet in "advance." At her speed she would travel 1,165 feet in a minute, and we may safely say, even allowing for her diminution of speed from her helm that she could not have been travelling over a minute from the time her helm went over.

Now the result of this is necessarily entirely to discredit the estimate of time of Westgarth, Johnson and Hyslop, and rather to credit the captain of the Alleghany, who says that Westgarth
255 put his telegraph full speed astern only when within hail. That there could have been anything like four minutes between the Alleghany's whistle and the collision seems to me so demonstrably untrue that I have no trouble in disregarding the testimony. The result is absurd, unless we suppose that after blowing, the Alleghany kept her helm amidships for three minutes. Even if we suppose that the Alleghany changed her course more

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than Westgarth says it does not help matters, for if the Alleghany was running for four minutes under a hard-a-starboard helm, she would move 4,660 feet. To be sure her helm would check her speed, but if her speed only averaged 70 per cent. of 11.5 knots she would have travelled 3,260 feet; and she would have turned through eight points and have been on parallel courses with the Pomaron in an "advance" of four lengths or only 1,240 feet, or before she reached the Pomaron's course. Again we must remember that even if it took four minutes for the ships to come into collision the Pomaron was not over 2,000 feet away, and if the Alleghany was anything like 4,660 feet away at the time it was a simple thing for her to port under the Pomaron's stern as the Rule requires. We must suppose that she was at once near enough to make that maneuvre seem impossible and yet that the Pomaron was so near as to make starboarding in fact impossible. We must also remember that the collision happened not far from the intersection of the courses, as I shall show.

Now, it may be thought that this does violence to the testimony, but remember that there is some testimony to the contrary, and also that Westgarth's first time estimate of the original porting
256 was absurd. His own and Hyslop's estimate of four minutes I should not have the least compunction in disregarding, were it not for Johnson's corroboration said to be taken from the clock. As to that, moreover, I am encouraged to disregard it, because it is clearly only approximate, any way. The shock was "about" 11:24. I was reversed "five" minutes. It takes "four" minutes to stop—though the Pomaron was by no means stopped. "I might easily have been out half a minute or three-quarters, because I saw the hands at an angle" (one minute is quite within the possibilities). "Three" minutes is the unusual rule for stopping. "Four" minutes is about near it. All this does not indicate an exact observation and I don't believe that he ever made one. It may have been thought important for the Pomaron to get as much way off as possible, and the witnesses moreover were corroborated in their natural bias, by what to the men on deck must have seemed the interminable period during which the ships were in extremis.

Consider next the actual maneuvre of the Pomaron. She was under a hard-a-starboard helm for the first half minute—the time it took to get the engines reversed. She had, therefore, with unchecked speed, travelled over four hundred and fifty feet, or nearly two lengths; during that time, her way being on, she had already swung nearly two points to starboard, before the screw was reversed. Thereafter under a reverse she would continue to swing to starboard though more slowly than if the engines were still ahead. Mr. Kneeland has cited from Knight the case where the engines are reversed at the same time that the helm is put hard over; he did not observe that "If the ship has actually begun to swing in
257 obedience to a hard-over helm before the screw is reversed, she will in most cases continue to swing in the same way in spite of the screw, although much less rapidly than if the screw were not reversed." How was it possible for the Pomaron to

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swinging to starboard for three and a half minutes more and still gain nothing to starboard beyond the two points she had made before the screw was reversed, for we must remember that she was headed about east southeast when she collided. As I view the collision, therefore, it occurred very much sooner after the Alleghany blew than four minutes, probably not over one minute after that time, certainly not two.

Having fixed the time of the maneuvers we must next fix the position of the vessels at the time of collision. As I have shown: the Alleghany's stern was still on her original course and she was at an angle of not more than three or three and a half points from it. As the collision occurred about one hundred feet from the stern we can easily calculate that the place of collision was somewhere about sixty feet to the east of the Alleghany's course. We can also tell how far to the south of the Pomaron's course the collision occurred if we assume that the Pomaron's stern was still dragging along her course; it would be about one hundred and sixty-five feet. To assume that the Pomaron's stern had not left the course is to assume that in this respect the vessel would have acted as if all the change of heading had been produced by a hard-over helm. As to this, Knight says, "In this case," where a small angle of helm is used, "also, the stern is thrown off and for some time the body of the ship moves along a line to leeward of
258 the original course." When the helm is hard over we know that the "some time" is two or three lengths and until the vessel has changed more than three points. There are, as far as I have found, no results of experiments with helms slightly over, but I think it fair to assume from the results set out by Knight that in about three lengths and with a change of only one point, the stern would not have left the course.

Another consideration corroborates this conclusion as to the distance to the south of the Pomaron's course that the collision must have occurred. The Alleghany's bow must have been at least two lengths away from the point of intersection when the helm was put over, because the Pomaron must have been at least six hundred feet away herself and the situation was such that the Pomaron could still suppose the Alleghany could cross under her stern. If so, the stern of the Alleghany was three lengths away and could not have much more than passed that point when the collision occurred, because if so the ship would have turned more than three and one-half points, a turn she will make in not more than three lengths. If so, the collision was not much to the south of the Pomaron's course, which is just where it ought to be if the Pomaron's stern had not yet left her own course.

If we assume that the stern of the Pomaron remained upon her old course till collision, that she headed east southeast, that the stern of the Alleghany remained on her course, that she headed southeast by south and that she was struck one hundred feet forward of her stern we can exactly find how far her stern was from the intersection of the two courses; it was seventy-six feet. If we

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then assume that the Pomaron had not originally ported,
259 but had in extremis done precisely as she did do, we can find at what part her bow would have crossed the course of the Alleghany; it would have been one hundred and twenty-seven feet from the intersection of the courses. If we assume therefore that the Pomaron's bow would have reached the course at the moment of the collision a collision was inevitable, even with an allowance of fifty feet. However, this assumes that the Pomaron changed her heading, but not her course, and there may be a question of this. All we certainly know is that when so much change of heading occurs under a hard-over helm the stern does not leave the course. We cannot know whether under the slight helm for the first minute the Pomaron may not have changed the course or "drift" of the ship. All we can say is that if she did change it at all, it was less than the one point change in her heading, because a turning ship always heads in upon the course she is at any given moment following. However, a very small change in her course would fix the collision at a place where the Pomaron's bow would have swung clear, had there been no original porting. Thus if the angle of drift had been only five degrees with original course when the Pomaron hard-a-ported, nevertheless she need have travelled only about five hundred and fifty feet to place the Alleghany's stern beyond tthe sweep of the Pomaron's bow. Indeed if the change of course were only three degrees or one-quarter of a point she need only travel about nine hundred and ten feet, or during the first minute after the telegraph was set full speed astern. It is plain enough that a very slight variation in her drift caused by the first porting might have made the difference between collision and safety.

260 However, it may be said that this is unfair because the time at which the Pomaron's bow would have entered the course of the Alleghany's stern was earlier than the moment of collision and that therefore the Alleghany must be put back further on her course. It is true that the bow of the Pomaron had to travel about sixty-five feet to the east of the Alleghany's course to come into collision but even if the Pomaron was travelling then at only seven knots per minute, it would have taken her less than six seconds to do this during which time the Alleghany would move only about one hundred feet. Besides this we must remember that the course of the Pomaron's bow to the Alleghany's course after she ported was more nearly at right angles than if she had not ported which means that her bow took a little shorter time to reach the Alleghany's course than it would otherwise have done. This difference if the actual distance to the Alleghany's course was nine hundred and twelve feet, i. e., if it took one minute to reach it, is about fifty feet which very nearly equals the distance to the east of the Alleghany's course which the bow had to go to get into collision.

Now it must be apparent to any candid person that when the Pomaron has the burden of proof all such calculations are the merest of speculation. I have followed them out,—and an im-

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mense deal more,—with a quite disproportionate expense of time in the hopes of finding some adequate ground for exonerating the Pomaron, a result which my sense of justice very greatly impels me to accomplish. It seems to me most unjust to hold that this ship should bear this loss, but although I have tried in every way I could think of to prove that the initial porting could not
261 have contributed to the collision, my final conclusion is that absolutely no certainty whatever is possible and that the exact facts have forever disappeared in the fleeting situation which has left no permanent memorial. If a ship which violates a rule becomes the guarantor of such proof, she must usually suffer. I do not weigh for a moment Westgarth's testimony that the initial porting made no difference.

The last question is of the Pomaron's maneuvers in extremis. It seems to me reasonably clear that, had Westgarth starboarded, he would have cleared the Alleghany. Such a maneuvre, even after the initial porting, would have probably thrown his bow off to port far enough to clear, and although the sterns might have collided, it is not likely. Had he held his course till the Alleghany blew and and then hard-a-starboarded, this would have been more certain. However, it does not follow that he should be held at fault for a wrong choice in extremis. Knight, page 258, does not recommend the maneuvre unless collision is inevitable and then only because it presents the holding-on vessel's bow to the danger, a failure to do which hardly lies as a complaint in the mouths of these libellants. He recommends that a holding-on vessel in this position port and keep her speed, but adds that it is a situation for which no hard and fast rule is applicable. It seems to me to be well within the rule in extremis. It must be remembered that for each vessel to move off from the other, as actually happened, made the courses converge and decreased the seriousness of the resulting collision in proportion. To starboard was to insure that if any collision did occur, it would be at right angles or near it. After figuring it out, I may now conclude that a hard-a-starboarded helm would have saved the day, but Westgarth had no means for
262 such a calculation and was suddenly confronted with the very worst maneuvre which his adversary could execute. He did the thing usually best and I will not therefore hold him for not starboarding.

The next question is of the Pomaron's failure to keep her speed. In the first place I do not think this had much to do with the collision in any event. If it took the Pomaron half a minute to reverse her engines, there could have been very little chance for a very marked change of speed. We may, however, suppose that the Pomaron's speed was reduced to seven or eight knots an hour; this was an advantage, but played no great part. Was it a wrong maneuvre in any event? It appears to be well settled that a vessel which ports should keep her speed, if she means to get away altogether, Knight, page 256. This is true for two reasons, first because she turns in a much shorter compass when her movement is not contradicted by her screw and second, because she passes more

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quickly out of the course of the other vessel. Had Westgarth any opportunity to clear the Alleghany this would have been his best maneuvre, though it would not necessarily have been fair to charge him for failing in extremis to choose the best. If on the other hand he had no chance to escape at all, as he certainly had not under a port helm, he did what was best because he tried to lessen the shock of collision, and he kept his own boat afloat and at least improved the chances of the Alleghany. It is true that the angle of collision might have been less and the blow more glancing, but it is a question whether this would have made up for the greater speed. At least he could not have crossed her bows, which is what the maneuvre requires, and he was surely not to blame for refusing to expose his side.

263 The necessary conclusion is that the Pomaron must be held for Westgarth's original porting, under the rule in the Pennsylvania, 19 Wall., 125, and the Agra, L. R. 1 P. C., 501. The time had not yet come when he needed to act alone, and his action was not in extremis; it was to assist the other vessel to accomplish her duty. I have already said that the result seems to me extremely inequitable and I should be glad if the appellate court could find otherwise, but while the holding-on is charged with the burden of proof, I can see no alternative [illegible] s one which shows the necessity for the proposed ne[illegible] will not hold each ship in solido, but will apportion [illegible]ing to fault. Had that been open to me, I should [illegible]ributed a very small fraction of blame indeed to the Pomaro[illegible] As it is, under what I cannot help calling a very mechanical and arbitrary rule of law, I see no escape from assessing this ship with the full loss for a trifling violation of the rule, for it remains true, however we may regret the result, that only unfounded speculation can justify us in saying that the violation could not have produced the collision. The only evidence which we have is necessarily wholly approximate and inexact; we should not treat it as the foundation for mathematical calculations without making large allowances, more than fifty or one hundred feet. The whole problem seems to me to come down to this: whether I should loyally apply the harsh rules as I find them to the evidence, or should try to mitigate their injustice by an appearance of certainty in deduction from shifty and unrealiable data.

The libellants will take the usual decrees.

264 To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The libel of M. H. Silvera against Furness, Withy & Company, Limited, in a cause of collision, civil and maritime, alleges as follows:

First. Libellant was the owner of a certain cargo on board the steamer Alleghany on the occasion of a collision on February 2nd, 1912, between said steamer and the British steamer Pomaron, off the coast of Virginia, as a result of which collision said steamer Alleghany was sunk and, with her cargo, including that owned by libellant, became a total loss.

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Second. At all the times hereinafter mentioned the respondent Furness, Withy & Company, Limited, was and is a foreign corporation organized under the laws of the Kingdom of Great Britain and Ireland, was and now is the sole owner of the British steamer Pomaron. Said respondent has property, credits and effects within this District.

Third. On or about the first day of February, 1912, the German steamer Alleghany, with a general cargo on board, including a large quantity of cargo owned by the libellant, left the port of New York, bound for various ports in the West Indies. While proceeding on her voyage, and at about 11 A. M. on the morning of February 2nd, 1912, the Alleghany was run into by the British steamer Pomaron at a point about 90 miles east of Cape Henry, Virginia, as a result of which the Alleghany was sunk, and with her cargo, including that owned by libellant, became a total loss. Libellant alleges, upon information and belief, that prior to the collision the Alleghany was proceeding on a course of South 4° West, magnetic, and the Pomaron—which had left Hampton Roads, bound for European ports—was standing on a course of East by North ¼ North, magnetic. The weather was clear, and both vessels were proceeding at full speed, the Alleghany making about 12 or 13 knots per hour, the Pomaron about 9 knots per hour. When the Alleghany and the Pomaron were first called upon to navigate with reference to each other, they were on crossing courses, the Alleghany having the Pomaron on her own starboard hand. At this time the navigating officer of the Alleghany was in the chart room, working up his position from observations taken shortly before. There was no officer on the bridge, and no sufficient lookout was being maintained. On the other hand the chief officer of the Pomaron was in charge of the navigation of his vessel, and first made out the Alleghany several miles away at a bearing given in the log book of the Pomaron as northeast. The Alleghany and the Pomaron continued to approach each other until they were about a mile apart, at which time the officer in charge of the Pomaron observed that the Alleghany was continuing on her southerly course proceeding at a speed of between twelve and thirteen knots per hour, with no one on her bridge. In that situation the Pomaron blew a signal of one whistle and ported her helm, and although her whistle remained unanswered, and although it was apparent that the Alleghany was keeping her course and speed the Pomaron continued on at her full speed of about nine knots and under her port helm, until the distance between the steamers was reduced from one mile to a half mile. At this point the Alleghany blew a signal of two whistles, indicating that her helm was being starboarded and that she would continue ahead and across the bows of the Pomaron. Thereupon the engines of the Pomaron were reversed at full speed and her helm put hard-a-port and kept hard-a-port until the stern of the Pomaron came into collision with the starboard side of the Alleghany at a point abaft the engine room, doing such damage to the Alleghany that she shortly afterwards filled and sank, and, [illegible] her cargo, became a total loss.

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ND CLOSE IN CENTER

Fourth. Said collision and consequent damage were not caused or contributed to by any fault or negligence on the part of your libellant, but were caused by the negligence and fault of both the steamers Alleghany and Pomaron more especially in the following particulars, among others which will be pointed out upon the trial of this action, to wit:

On the Part of the Steamer "Alleghany."

1. In that a good lookout was not maintained;
2. In that she failed to give timely signals of her intention to continue across the bows of the Pomaron;
3. In that she failed to take proper measures to avoid collision after she saw or should have seen that the Pomaron was continuing her course to starboard in violation of the starboard-hand rule.

On the Part of the Steamer "Pomaron."

1. In that a good lookout was not maintained;
2. In that she failed to keep her course as well as her
267 speed as required by the starboard-hand rule;
3. In that, while she and the Alleghany were approaching each other on crossing courses, and when they were a mile apart, she negligently blew a signal of one whistle and ported her helm in reckless attempt to cross the bows of the Alleghany;
4. In thereafter continuing at full speed under a port helm until the distance between the vessels was decreased from one mile to a half mile while her one whistle signal remained unanswered, and while it was obvious that the Alleghany was continuing ahead without change of course or speed, with no one on her navigating bridge;
5. In failing seasonably to stop and reverse in order to avoid a collision;
6. In putting her helm to port instead of to starboard after the Alleghany blew her signal of two whistles when the vessels were half a mile apart.

Fifth. By reason of the premises libellant has sustained damages in the loss of cargo shipped by him as aforesaid amounting in the aggregate to the sum of — dollars no part of which has been paid, although duly demanded.

Sixth. Upon information and belief, the respondent, Furness, Withy & Company, Limited, is a foreign corporation and, as libellant is informed and believes, none of its officers or directors reside in this District. Said respondent, however, has, or during currency of process hereunder will have, certain property within this district.

268 Seventh. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore libellant prays that process may issue with clause of foreign attachment against the respondent, Furness, Withy & Company, Limited, citing it to appear and answer in the premises

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further commanding the Marshal of this District in case the said respondent cannot be found within this District, to attach its credits and effects to the amount sued for, and that a decree may be entered against the respondent in favor of the libellant for the amount of his damages aforesaid, with interest thereon, together with the costs and disbursements of this action, and that the Court may grant such further and other relief as the justice of the cause may require.

WALLACE, BUTLER & BROWN,
Proctors for Libellant.

54 Wall Street, New York City.

STATE OF NEW YORK,
County of New York, ss:

James K. Symmers, being duly sworn, deposes and says that he is a member of the firm of Wallace, Butler & Brown, proctors for the libellant herein; that he has read the foregoing libel and knows the contents thereof and that the same is true of his own knowl-
269 edge, except as to the matters therein stated upon information and belief and as to those matters he believes it to be true.

That the reason this vertification is not made by libellant is that libellant is not now within one hundred miles of New York City.

JAMES K. SYMMERS.

Sworn to before me this 22nd day of April, 1913.
[SEAL.] WILLIAM H. WILSON, JR.,
Notary Public, Kings County, No. 167.

Certificate filed in New York County, No. 69.
Kings County Register's No. 7042.
New York County Register's No. 5179.

The answer of Furness, Withy & Company, Limited, to the libel of M. H. Silvera, and the libels to recover damages for loss of cargo, filed by Wallace, Butler & Brown on behalf of Walter Oloffson, et al., and of Hazan & Co., against Furniss, Withy & Co. together with the answers of Furness, Withy & Co., Limited, thereto, are omitted from the printing of the transcript of record herein (see stipulation as to record on appeal).

ND CLOSE IN CENTER

270 At a Stated Term of the United States District Court for the Southern District of New York, Held at the Court Rooms Thereof, in the Post-office Building, Borough of Manhattan, City of New York, on the 12th Day of June, 1913.

Present: Hon. Learned Hand, United States District Judge.

YANG-TSZE INSURANCE ASSOCIATION, LIMITED, et al.
against
FURNESS, WITHY & COMPANY, LIMITED.

NORD-DEUTSCHE INSURANCE COMPANY et al.
against
FURNESS, WITHY & COMPANY, LIMITED.

FEDERAL INSURANCE COMPANY
against
FURNESS, WITHY & COMPANY, LIMITED.

WALTER OLOFFSON et al.
against
FURNESS, WITHY & COMPANY, LIMITED.

M. H. SILVERA
against
FURNESS, WITHY & COMPANY, LIMITED.

HAZAN & COMPANY
against
FURNESS, WITHY & COMPANY, LIMITED.

271 BOSTON INSURANCE COMPANY
against
FURNESS, WITHY & COMPANY, LIMITED.

WALTER D. DESPARD
against
FURNESS, WITHY & COMPANY, LIMITED.

EUGENE J. F. COLEMAN
against
FURNESS, WITHY & COMPANY, LIMITED.

MARSHALL K. WEIDENSAUL
against
FURNESS, WITHY & COMPANY, LIMITED.

FRANCES W. VAN PRAAG,
against
FURNESS, WITHY & COMPANY, LIMITED.

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ORTON G. ORR
against
FURNESS, WITHY & COMPANY, LIMITED.

LAURA MOORE
against
FURNESS, WITHY & COMPANY, LIMITED.

LOUIS BERTSCHMAN
against
FURNESS, WITHY & COMPANY, LIMITED.

UNITED STATES OF AMERICA
against
FURNESS, WITHY & COMPANY, LIMITED.

Final Decree.

272 The above-entitled suits having been brought on for trial simultaneously, and having been heard on the pleadings and proofs adduced by the respective parties, and having been argued by their respective advocates, and due deliberation having been had, and the Court having rendered a decision that the libellants are entitled to recover of the respondent by reason of the matters set forth in the libels, and the damages of the libellants having been fixed by mutual agreement, as appears by consent at the foot hereof, without prejudice to the right of the respondent to appeal herein from this decree, in the following sums:

Yang-tsze Insurance Association, Limited, et al	$18,224.99
Nord-Deutsche Insurance Company et al	13,148.48
Federal Insurance Company	22,204.62
Walter Oloffson et al	1,886.64
M. H. Silvera	1,975.18
Hazan & Company	1,152.73
Boston Insurance Company	9,017.39
Walter D. Despard	13,683.09
Eugene J. F. Coleman	5,234.23
Marshall K. Weidensaul	986.08
Frances W. Van Praag	983.58
Orton G. Orr	26,080.65
Laura Moore	11,040.84
Louis Bertschman	28,483.26
United States of America	4,582.01

with interest on the several amounts above set forth from February 2, 1912, and the costs of the libellants having been taxed in the following amounts:

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273	Yang-tsze Insurance Association, Limited, et al.....	$54.60
	Nord-Deutsche Insurance Company, et al	51.70
Federal Insurance Company		54.05
Walter Oloffson, et al.		2.40
M. H. Silvera		2.40
Hazan & Company.....		2.40
Boston Insurance Company.....		30.15
Walter D. Despard.....		53.30
Eugene J. F. Coleman.....		53.30
Marshall K. Weidensaul.....		53.30
Frances W. Van Praag.....		53.30
Orton G. Orr.....		83.75
Laura Moore.....		53.30
Louis Bertschman.....		53.30
United States of America.....		49.92

Now, on motion of Convers & Kirlin, proctors for the libellants, Yang-tsze Insurance Association, Limited, et al., and Nord-Deutsche Insurance Company, et al., it is hereby

Ordered that the above-entitled suits be and they hereby are consolidated; and on like motion, it is hereby ordered, adjudged and decreed:

1. That the libellant, Yang-tsze Insurance Association, Limited, et al., recover of the respondent, Furness, Withy & Company, Limited, the sum of $18,224.99, with interest thereon from February 2, 1912, in the sum of $1,458.00, together with $54.60 costs as taxed, amounting in all to the sum of $19,737.59, with interest thereon until paid.

274 2. That the libellant, Nord-Deutsche Insurance Company, et al., recover of the respondent, Furness, Withy & Company, Limited, the sum of $13,148.48, with interest thereon from February 2, 1912, in the sum of $1,051.88, together with $51.70 costs as taxed, amounting in all to the sum of $14,252.02, with interest thereon until paid.

3. That the libellant, Federal Insurance Company, et al., recover of the respondent, Furness, Withy & Company, Limited, the sum of $22,204.62, with interest thereon from February 2, 1912, in the sum of $1,776.37, together with $54.05 costs as taxed, amounting in all to the sum of $24,035.04, with interest thereon until paid.

4. That the libellants, Walter Oloffson, Robert Luacas and C. Lyon Paul, doing business as Oloffson, Luacas & Company, recover of the respondent, Furness, Withy & Company, Limited, the sum of $1,886.64, with interest thereon from February 2, 1912, in the sum of $150.93, together with $2.40 costs as taxed, amounting in all to the sum of $2,039.97, with interest thereon until paid.

5. That the libellant, M. H. Silvera, recover of the respondent, Furness, Withy & Company, Limited, the sum of $1,975.18, with interest thereon from February 2, 1912, in the sum of $158.01, together with $2.40 costs as taxed, amounting in all to the sum of $2,135.59, with interest thereon until paid.

6. That the libellant, Hazan & Company, recover of the re

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ent, Furness, Withy & Company, Limited, the sum of $1,152.73, with interest thereon from February 2, 1912, in the sum of
275 $92.22, together with $2.40 costs as taxed, amounting in all to the sum of $1,247.35, with interest thereon until paid.

7. That the libellant, Boston Insurance Company, recover of the respondent, Furness, Withy & Company, Limited, the sum of $9,017.39, with interest thereon from February 2, 1912, in the sum of $721.39, together with $30.15 costs as taxed, amounting in all to the sum of $9,768.93, with interest thereon until paid.

8. That the libellant, Walter D. Despard, recover of the respondent, Furness, Withy & Company, Limited, the sum of $13,683.09, with interest thereon from February 2, 1912, in the sum of $1,094.85, together with $53.30 costs as taxed, amounting in all to the sum of $14,831.24, with interest thereon until paid.

9. That the libellant, Eugene J. F. Coleman, recover of the respondent, Furness, Withy & Company, Limited, the sum of $5,234.23, with interest thereon from February 2, 1912, in the sum of $418.74, together with $53.30, costs as taxed, amounting in all to the sum of $5,706.27, with interest thereon until paid.

10. That the libellant, Marshall K. Weidensaul, recover of the respondent, Furness, Withy & Company, Limited, the sum of $986.08, with interest thereon from February 2, 1912, in the sum of $78.89, together with $53.30 costs as taxed, amounting in all to the sum of $1,118.27, with interest thereon until paid.

276 11. That the libellant, Frances W. Van Praag, recover of the respondent, Furness, Withy & Company, Limited, the sum of $983.58, with interest thereon from February 2, 1912, in the sum of $78.69, together with $53.30 costs as taxed, amounting in all to the sum of $1,115.57, with interest thereon until paid.

12. That the libellant, Orton G. Orr, recover of the respondent, Furness, Withy & Company, Limited, the sum of $26,080.65, with interest thereon from February 2, 1912, in the sum of $2,086.45, together with $83.75 costs as taxed, amounting in all to the sum of $28,250.85, with interest thereon until paid.

13. That the libellant, Laura Moore, recover of the respondent, Furness, Withy & Company, Limited, the sum of $11,040.84, with interest thereon from February 2, 1912, in the sum of $883.27, together with $53.30 costs as taxed, amounting in all to the sum of $11,977.41, with interest thereon until paid.

14. That the libellant, Louis Bertschman, recover of the respondent, Furness, Withy & Company, Limited, the sum of $28,483.26, with interest thereon from February 2, 1912, in the sum of $2,278.66, together with $53.30 costs as taxed, amounting in all to the sum of $30,815.22, with interest thereon until paid.

15. That the libellant, United States of America, recover of the respondent, Furness, Withy & Company, Limited, the sum of $4,582.01, with interest thereon from February 2, 1912, in the
277 sum of $366.56, together with $49.92 costs as taxed, amounting in all to the sum of $4,998.49, with interest thereon until paid. And it is further

ordered that unless this decree be satisfied or an appeal taken

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therefrom within ten days after service of a copy thereof, with notice of entry, on the respondent, or its proctors, the sureties on the respondent's stipulations for costs, and the sureties on the respondent's stipulation for value, cause the engagements of their stipulations to be performed, or show cause within four days, or on the first day of jurisdiction thereafter why execution should not issue against their goods, chattels and lands to satisfy this decree.

LEARNED HAND,
United States District Judge.

A. G., JR.

The damages of the several libellants above mentioned having been fixed by agreement as above set forth, we waive notice of settlement of the foregoing decree.

CONVERS & KIRLIN,
Proctors for Yang-tsze Insurance Association, Limited, et al., and Nord-Deutsche Insurance Company, et al.

KNEELAND, HARRISON & HEWITT,
Proctors for the Federal Insurance Company et al.

BARRY, WAINWRIGHT, THACHER & SYMMERS,
Proctors for Walter Oloffson, et al., M. H. Silvera and Hazan & Co.

278 WILLIAMS & STEVENSON,
Proctors for Boston Insurance Co.

HARRINGTON, BINGHAM & ENGLAR,
Proctors for Walter D. Despard, Eugene J. F. Coleman, Marshall K. Weidensaul, Frances W. Van Praag, Orton G. Orr, Laura Moore, and Louis Bertschman.

H. SNOWDEN MARSHALL,
Proctor for United States of America.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Furness, Withy & Company, Limited.

[Endorsed:] Final decree entered June 13, 1913.

279 United States District Court, Southern District of New York

Notice of Appeal.

YANG-TSZE INSURANCE ASSOCIATION, LIMITED, et al.,
against
FURNESS, WITHY & COMPANY, LIMITED.

NORD-DEUTSCHE INSURANCE COMPANY et al.
against
FURNESS, WITHY & COMPANY, LIMITED.

FEDERAL INSURANCE COMPANY
against
FURNESS, WITHY & COMPANY, LIMITED.

WALTER OLOFFSON et al.
against
FURNESS, WITHY & COMPANY, LIMITED.

M. H. SILVERA
against
FURNESS, WITHY & COMPANY, LIMITED.

HAZAN & COMPANY
against
FURNESS, WITHY & COMPANY, LIMITED.

BOSTON INSURANCE COMPANY
against
FURNESS, WITHY & COMPANY, LIMITED.

280 WALTER D. DESPARD
against
FURNESS, WITHY & COMPANY, LIMITED.

EUGENE J. F. COLEMAN
against
FURNESS, WITHY & COMPANY, LIMITED.

MARSHALL K. WEIDENSAUL
against
FURNESS, WITHY & COMPANY, LIMITED.

FRANCES W. VAN PRAAG
against
FURNESS, WITHY & COMPANY, LIMITED.

ORTON G. ORR
against
FURNESS, WITHY & COMPANY, LIMITED.

LAURA MOORE
against
FURNESS, WITHY & COMPANY, LIMITED.

LOUIS BERTSCHMAN
against
FURNESS, WITHY & COMPANY, LIMITED.

UNITED STATES OF AMERICA
against
FURNESS, WITHY & COMPANY, LIMITED.

SIRS: Take notice that the respondent, Furness, Withy &
281 Company, Limited, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, from the final decree

of this Court entered herein June 13, 1913, and from each and every part of said decree.

Dated, New York, June 18, 1913.

Yours, etc.,

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Respondent.

To Messrs, Convers & Kirlin, Proctors for Yang-tsze Insurance Association, Ltd., et al., and Nord-Deutsche Insurance Co., et al.; Messrs. Kneeland, Harison & Hewitt, Proctors for Federal Insurance Co., et al.; Messrs. Barry, Wainwright, Thacher & Symmers, Proctors for Walter Oloffson, et al., M. H. Silvera and Hazan & Co.; Messrs. Williams & Stevenson, Proctors for Boston Insurance Co.; Messrs. Harrington, Bigham & Englar, Proctors for Walter D. Despard, Eugene J. F. Coleman, Marshall K. Weidensaul, Frances W. Van Praag, Orton G. Orr, Laura Moore, and Louis Bertschman; H. Snowden Marshall, Esq., Proctor for United States of America.

[Endorsed:] Notice of Appeal, June 18, 1913.

282 *Assignments of Error.*

United States District Court, Southern District of New York.

YANG-TSZE INSURANCE ASSOCIATION, LTD., and Others, Libellants,
against
FURNESS, WITHY & COMPANY, LIMITED, Respondents, and 14 Other Suits.

The respondent, Furness, Withy & Company, Ltd., hereby assigns error in the decision and final decree of the United States District Court for the Southern District of New York as follows:

1. In that the Court did not hold that the collision between the Pomaron and Alleghany was due solely to the gross negligence of the Alleghany.

2. In that the Court held the Pomaron in fault for porting.

3. In that the Court held that a burden rested on the Pomaron to show that her porting did not contribute, and could not have contributed, to the collision.

4. In that the Court did not find that the situation was one of special circumstances under Article 27 of the International Rules.

283 5. In that the Court did not dismiss the libels as against the respondent, with costs.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Respondent.

[Endorsed:] Assignments of error filed October 2, 1913.

284 United States District Court, Southern District of New York.

YANG-TSZE INSURANCE ASSOCIATION, LIMITED, et als., Libellants,
against
FURNESS, WITHY & COMPANY, LIMITED, Respondent, and Other Cases.

It is hereby stipulated that only one of the several libels filed by each proctor and the answer thereto need be printed in the transcript of record herein; but that the libels and answers thus omitted be considered as set forth with the same force and effect as if printed herein.

It is further stipulated and agreed that the Yang-tsze Exhibits Nos. 1 to 9, Nord-Deutsche Nos. 1 to 7, and Federal Nos. 1 to 12, being bills of lading, invoices and assignments, Exhibit 14 being a blue print, and Pomaron's Exhibits Nos. 2 to 6, being photographs of the steamship Pomaron, be omitted from the printing of the record herein, but may be submitted to the Court on the hearing of this appeal.

It is further stipulated that the foregoing is a true transcript of the record of the said District Court.

Dated, New York, November 21, 1913.

CONVERS, & KIRLIN,
Proctors for Yang-tsze Insurance Association, et al.

285 BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for SS. Pomaron.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Walter D. Despard et al.

KNEELAND, HARISON & HEWITT,
Proctors for Federal Ins. Co. et al.

WILLIAMS & STEVENS,
Proctors for Boston Ins. Co.

BARRY, WAINWRIGHT, THACHER & SYMMERS,
Proctors for M. H. Silvera et al.

H. SNOWDEN MARSHALL, ESQ.,
Proctor for the United States of America.

286 United States District Court, Southern District of New York.

YANG-TSZE INSURANCE ASSOCIATION, LIMITED, et al., Libellants-Appellees,
against
FURNESS, WITHY & COMPANY, LIMITED, Respondent-Appellant, and 14 Other Cases Against Same, Respondent.

I, Alexander Gilchrist, Jr., Clerk of the United States District Court of the United States of America, for the Southern District of New York, do hereby certify that the foregoing is a true transcript

of the record of the District Court of the United States in the above entitled cause, as agreed on by the parties.

In testimony whereof, I have caused the seal of said Court to be affixed, at the City of New York, this — day of October, in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States the one hundred and thirty-seventh.

ALEXANDER GILCHRIST, JR., *Clerk.*

287 United States Circuit Court of Appeals for the Second Circuit, October Term, 1913.

No. 201.

Argued March 20, 1914; Decided June 10, 1914.

THE YANG-TSZE INSURANCE ASSOCIATION et al., Libellants-Appellees,

vs.

FURNESS, WITHY & COMPANY, LTD., Respondent-Appellant (and Fourteen Other Cases).

Appeal from the District Court of the United States for the Southern District of New York.

Before Lacombe, Ward and Rogers, Circuit Judges.

Burlingham, Montgomery and Beecher, Proctors for Appellant; Charles C. Burlingham, Norman B. Beecher, Robinson Leech, Counsel; Convers and Kirlin, Proctors for Appellees; J. Parker Kirlin, William H. McGrann, Advocates. Harrington, Bingham & Englar, Proctors for Libellants-Appellees; Eugene J. Coleman, et al., Howard S. Harrington, Advocate. Lawrence Kneeland, Counsel for Appellee; Kneeland, Harrison and Hewitt, Proctors.

This cause comes here upon appeal to review a decree of the District Court of the United States for the Southern District of New York in favor of certain owners and underwriters of cargo of the German Steamship Alleghany for damages resulting from the total loss of the cargo as the result of a collision with the Pomaron on February 2, 1912.

288 The original libels were filed against the owners of the two vessels jointly. But the Hamburg-American Company, the owner of the Alleghany, filed a petition for the limitation of its liability and surrendered the amount of its pending freight for the voyage and the libels were thereupon stayed as to that company.

ROGERS, *Circuit Judge:*

Furness, Withy & Company, Ltd., a corporation created by and existing under the laws of the United Kingdom of Great Britain

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and Ireland prosecutes this appeal to reverse a decree of the court below. Fifteen separate libels were filed against the above named corporation. The separate libellants were: Yang-Tsze Insurance Association, Ltd., et al., Nord-Deutsche Insurance Company, et al., Federal Insurance Company; Walter Oloffson, et al., M. H. Silvera; Hazen and Company; Boston Insurance Company; Walter Despard; Eugene J. F. Coleman; Marshall K. Weidensaul; Frances W. Van Praag; Orton G. Orr; Laura Moore; Louis Bertschman; United States of America. The various libellants brought suits for cargo losses except the United States. The Government suit was for loss of registered mail carried by the Steamship Alleghany which sank at sea because of a collision with the Steamship Pomaron and the suits were brought against the owners of the latter vessel. The suits were brought on for trial simultaneously having been consolidated and heard on the pleadings and proofs. The court below rendered a decision that the libellants were entitled to recover. One decree was entered awarding in all, damages and costs amounting to $172,029.81.

This collision occurred off the capes of Virginia about 11.30 A. M. on February 2, 1912. The Alleghany was on a voyage from New York to the West Indies. The vessel was an ordinary tramp steamer, 310 feet long. The Pomaron was a steel screw steamship of 1,809 tons gross and 1,027 tons net, 278 feet long and belonged to Furness, Withy & Co., Limited. She was on her way from Baltimore to European ports and loaded with grain and general cargo. The Pomaron sighted the Alleghany about an hour before the accident, the latter being some ten or twelve miles away and on her port hand. Each vessel kept her course and speed for some forty-five min-
289 utes. During this time the chief officer of the Pomaron had the Alleghany under constant observation. But all this time the Alleghany had not seen the Pomaron at all. This was occasioned by the fact that her chief officer, then on watch, had taken his observation and gone into the chart room to calculate his position. The Alleghany did not discover the Pomaron until the latter blew one blast on her whistle and ported her helm. This was between five and seven minutes of the collision. Between the time when the Pomaron saw the Alleghany and the time when she blew the blast on her whistle the two vessels had continued to approach each other without change of course or speed. At the time the Pomaron sounded the whistle the two vessels were about a mile apart and the Alleghany was proceeding at a speed of 11½ knots per hour and the Pomaron at a speed of 9 knots. After the Pomaron sounded the whistle the Alleghany shortly blew two blasts and thereupon the chief officer of the Pomaron at once rang the engines full speed astern and ordered the helm hard-a-port. He testified that after he had run full speed astern he saw the Alleghany had put her helm hard-a-starboard and he could see "she was swinging around, her stern was flying into us and of course, when he put his helm hard-a-starboard, his stern swung around and caught us on the bow, about abreast of No. 3 hatch." The bow of the Pomaron struck the starboard quarter of the Alleghany about 100 feet from

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her stern and about 3 o'clock in the afternoon the Alleghany sank. Before the collision the Alleghany was on a course approximately south and the Pomaron on a course approximately east, the vessels being on crossing courses and the Alleghany having the Pomaron on her starboard hand. As the two vessels were on crossing courses they were subject to Article 19 of the International Regulations. That article is as follows:

"When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way of the other."

And Article 21 provides:

"Where, by any use of these rules, one of two vessels is to keep out of the way, the other shall keep her course and speed."

290 The Pomaron was to the southward and westward of the Alleghany and on the latter's starboard hand as the two vessels approached each other. These respective courses had been maintained for several hours prior to the collision and the two vessels were about a mile apart when the Pomaron, the privileged vessel, changed her course to starboard. In doing so she failed to comply with Article 21. The Pomaron seeks to excuse its porting under Article 27. That Article is as follows:

"In obeying and construing these rules due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

It becomes necessary, therefore, to inquire whether the special circumstances as they existed at the time the Pomaron altered her course was justified under Article 27.

The application of rule 27 is restricted by its terms to situations of immediate danger. That rule applies only to exceptional cases. As said by the Supreme Court in The Oregon, 158 U. S., 186, 202, exceptions to the rules are to be admitted "with great caution and only when imperatively required by special circumstances of the case. It follows that, under all ordinary circumstances, a vessel discharges her full duty and obligation to another by a faithful and literal observance of these rules." In Marsden's Collisions at Sea, 6th Ed., p. 455 it is said:

"But Article 27 applies only to cases where 'there is immediate danger, perfectly clear;' and the departure from the rules must be no more than is necessary."

The 'special circumstances' apparently relied upon to excuse the Pomaron under Article 27 is the testimony of the officer in charge of the vessel that he could see no one on the bridge of the Alleghany. And attention is called to the doctrine of the Supreme Court in The Delaware, 161 U. S., 459, where it is said:

"The weight of English, and perhaps of American authorities is to the effect that if the master of the preferred steamer

291 has any reason to believe that the other will not take measures to keep out of her way, he must treat this as a 'special circumstance' under Rule 24 (now Rule 27), 'rendering a departure from the rules 'necessary to avoid immediate danger.'"

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And the officer in charge of the Pomaron insisted that the change in the Pomaron's course did not cause the collision. His testimony was as follows:

"Q. What was the danger?

A. I saw if he was going to keep on the was he was doing he would catch us somewhere about the engine room.

Q. If you had maintained your course he would have struck you near the engine room?

A. Yes, about midships.

Q. If you had both maintained the courses you were on then without change, what do you think would have happened?

A. He would have run into us amidships.

Q. Are you sure of that?

A. Yes.

Q. Wouldn't he have got across your bow?

A. No, sir; he couldn't have done it.

Q. Could you have possibly got across his bow?

A. No."

And on cross-examination he was asked "do you think collision would have happened if you had not ported your helm? A. Yes, it would have happened in any case; she would have caught us somewhere probably about amidships if I had not ported."

But there can be no doubt that it was the duty of the Pomaron to have kept on her course until a departure was necessary to avoid immediate danger. At the time she ported her helm she was a mile away from the Alleghany and the circumstances had not yet developed which justified any departure from the established rules. Her chief officer was asked: "In order to get the matter quite plain on the record, will you tell us when it was that in your judgment the circumstances had developed so that collision became unavoidable unless you did something." To which he replied: "Really not until the Alleghany had given me two blasts on the whistle." At
292 that time the two vessels were, according to his testimony, half a mile away from each other. He testified that up to that time he had appreciated risk of collision but though it might have been avoided by the other vessel. He was then asked: "Then it became under the rule your duty to do something." And he answered, "Yes." "It had not been your duty to do anything before that?" To which he replied, "No, sir." It is established, therefore, upon the testimony of the chief officer of the Pomaron that he departed from the rule before it was necessary for him to do something to avoid an otherwise unavoidable collision.

We are obliged, therefore, to hold that the Pomaron not only violated Article 21 but that in doing so was not excused under Article 27. Concluding then, as we have, that the Pomaron was in fault, it remains to inquire whether the fault contributed to the collision. For if the fault had nothing to do with the collision it may be disregarded. The law unquestionably is that in cases of collision liability for damages rests upon the ship or ships whose fault occasioned the injury. And in considering whether this fault of the Pomaron contributed to the collision it is necessary to keep

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in mind the rule laid down by the Supreme Court in The Pennsylvania, 19 Wallace 125, 136 (1893) where the court said:

"But, when as in this case, a ship at the time of the collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the Statute."

The principle thus laid down that when a ship at the time of the collision is acting in violation of a statutory rule that burden is on her to show not merely that her fault might not have been one of the causes, or that it probably was not but that it could not have been one of the causes of the collision has been reaffirmed in subsequent cases and is the law beyond all controversy. Richelieu Navigation Company, 136 U. S., 408, 422, 423 (1890); Belden vs. Chase, 150 U. S., 674, 699 (1893).

293 And the same rule is established in the English Courts. The Agra, L. R., 1 P. C., 501, 504, 505. The Elizabeth Jenkins, L. R., 1 P. C., App., 501. Under these decisions the burden of proof rests upon the Pomaron to show that the fault she committed could not have been one of the causes of the collision.

But whether the collision would or would not have occurred if the Pomaron had held her course and speed cannot now possibly be determined because of the doubt which exists as to the exact bearing of the Alleghany from the Pomaron at the time. The bearing entered in the Pomaron's log is "about northeast" but both her chief officer and her wheelsman have testified that this is not correct, and that the bearing was between four and five points, nearer five than four. But the officer of the Pomaron for some inconceivable reason contented himself after his discovery of the Alleghany with one hasty sight over the compass to ascertain whether or not the bearing of the Alleghany was changing. He admitted that he watched the bearing of the Alleghany "just roughly" and that he didn't bother to take any bearings at all" and that the Alleghany's bearing might have been more or it might have been less than three points if he "had taken a correct bearing." He is not to be excused for his failure to take correct bearings and should have taken several correct bearings during the forty-six minutes which elapsed from first sighting the Alleghany to the collision, or during the thirty-nine minutes from first sighting her to his change of course. Asked as to whether he took the bearing by the compass, he replied: "It was not a proper compass bearing; I just glanced over the top of the compass and took a rough bearing." Then he was asked: "It was not a guess, you looked at the compass?" To this he answered: "It was not a true bearing, not an accurate bearing." He also testified that at that time the Alleghany was bearing northeast and was three points or more on his port bow. The Alleghany remained on her original course until just before the collision. Whether she changed just before the collision is not free from

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doubt. The officer of the Alleghany who was on watch at the time says that "no commands were given to the steersman of the Alleghany," although the chief officer of the Pomaron states that the Alleghany swung under a starboard helm. If the Alleghany did
bear northeast and was three points on the Pomaron's port
294 bow when the latter changed course it is a demonstrable proposition that a collision would not have occurred if both vessels had continued on as they were, neither one changing her course. It can readily be ascertained by applying the speed ratios whether the intersections of the known courses would be coincident, whether or not the two vessels would come together. If the Alleghany was three points on the Pomaron's port bow and had not changed her speed or course she would have passed the point where the two courses intersected safely and some seconds before the Alleghany reached it. And if as some of the testimony indicated the Alleghany was five points on the Pomaron's port bow the Alleghany would have passed the point of intersection about two minutes before the Pomaron reached it. But in reality the contradictions in the testimony as to what the actual bearing of the vessels was makes it impossible to demonstrate whether or not any change at all in the Pomaron's course or speed was necessary to avoid collision. We have already cited the opinion of the chief officer of the Pomaron that the collision would have happened if neither vessel had not changed. But we cannot accept his testimony on the point as conclusive. He estimated that the Alleghany was making thirteen knots and this according to his report to the Board of Trade was a knot and a half more than she was making. This would make a difference of 750 feet in the Alleghany's position in the five minutes which elapsed between the first porting and the collision.

The loss of property for which a recovery is sought was due to a collision on the high seas, in broad day light and in clear weather and with no other vessels about to embarrass or interfere with navigation. The two vessels involved were steamers and, therefore, could be manœuvered more easily than any other kind of vessels. They were in plain sight of each other when miles apart. They nevertheless came into collision and with such force that one of them sank in a few hours carrying down with her the entire cargo. It is difficult to see how it all happened unless both vessels were in fault and failed to exercise reasonable care. Plain common sense constrains one to such a conclusion. To exonerate either of them under such conditions can be justified only if upon the closest scrutiny of the navigation of each vessel it can be discovered that one of them
was free from all culpable blame. We have examined the
295 evidence in the case with care and we have not been satisfied that either one of these vessels was free from fault. The vessels that navigate the high seas and indeed vessels that navigate inland waters, entrusted with human lives and property of great value, must be held to the strictest standards of conduct and when they fail to observe the requirements which the maritime law of the nations has prescribed are to understand that they must abide the consequences.

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That the negligence of the Alleghany was inexcusable and even unparalleled, seemed to be admitted. The vessel was under the command of one of the best officers the Hamburg line had in its service. But he had no idea that there was any vessel anywhere in his vicinity. And for three quarters of an hour prior to the collision there was no lookout. The owners of that vessel filed a petition for limitation of liability and surrendered the amount of the freight for the voyage.

The court below assessed the Pomaron with the full loss while stating that the case was one "which shows the necessity for the proposed new rule which will not hold each ship in solido but will apportion liability according to fault." And it was urged upon us in argument that the court erred in not apportioning the damages in accordance with the degree of fault. Attention was called to the fact that the Alleghany was a German vessel and that her cargo, for the loss of which the suit was brought was shipped under bills of lading isued by the Hamburg-American Line, a corporation organized under the laws of the German Empire. And as the Pomaron was a British vessel it is said that it was the duty of the court to have taken judicial notice of the fact that by the Maritime Conventions Act (1 and 2 Geo. V. C. 57) the English rule as to division of loss by collision due to mutual fault was modified in accordance with the convention signed at the Brussels Conference in 1910. In like manner it is said that judicial notice should have been taken of §735 of the Commercial Code of Germany of May 10, 1897, which reads as follows:

"If the collision is caused by faults of both sides, then the liability for damages, as well as the amount of the damages to be paid,
296 depends on the circumstances, especially to what extent the collision has been caused by the prevailing fault of the members of one or the other crew."

It may be that at the time when this collision occurred the laws of Great Britain and Germany coincided in providing that the liability for damages is to be in proportion to the degree in which each vessel is in fault. If the foreign law had been pleaded and proved, and the court had assessed the damages in accordance with it, there would have been some authority for so doing. That course was adopted by the Circuit Court of Appeals in The Eagle Point, 142 Fed. 453 (1906). But in the case at bar there is nothing in the record to show the law of Germany or of Great Britain and the court was not at liberty to take judicial notice of it. The Federal Courts do not take judicial notice of the laws of a foreign nation designed only for the direction of its own affairs. But it has been held that in a certain class of cases a court of admiralty has the right to take judicial notice of the law promulgated by a foreign state if it relates to general maritime law. See Talbot vs. Seaman, 1 Cranchl. 38; The Scotia, 14 Wall. 170; The Belgenland, 114 U. S., 355, 370; The New York, 175 U. S., 187. In the Talbot case the right to take judicial notice was asserted of a foreign law but the law was one which had been promulgated in the United States as the law of France by the joint act of that Department [illegible]

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intrusted with foreign intercourse, and of that which is invested with the powers of war. And the decision seems to have been based on the fact that it had been so promulgated. In the Scotia case the court held that judicial notice might be taken of the original Rules and Regulations, which had been adopted by the British orders in Council in 1863 and by Congress in 1864 and by more than thirty of the principal commercial states of the world and that they might be treated as laws of the sea and of general obligation. And in the Belgenland case the court said these Rules and Regulations having been, for more than twenty years, adopted by all the principal maritime [illegible] of the world they would be presumed to be binding upon foreign as well as domestic ships unless the contrary was made to appear. And in the New York case the court stated it knew of no reason why the rule adopted in the Scotia case should not be applied to the Revised International Rules and Regu-
297 lations. But we do not find in any of these cases that the court has laid down the rule that it is the duty or the right of the court of admiralty to take judicial notice of local changes made in the general admiralty law of any foreign nation. On the contrary it satisfactorily appears that no such right is recognized. In the Belgenland case the court considered the question as to the law to be applied in cases of collision on the high seas between ships of different nationalities and said: "there can be no doubt that it must be the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted." It added that this rule had some qualifications and among such qualifications stated "that if the maritime law, as administered by both nations to which the respective ships belong, be the same in both in respect to any matters of liability or obligation, such law, if shown to the court, should be followed in that matter in respect to which they agree, though it differ from the maritime law as understood in the country of the forum; for as respects the parties concerned, it is the maritime law which they mutually acknowledge." In Liverpool Steam Company vs. Phenix Insurance Company, 129 U. S., 397, 444, 445 (1889) an admiralty case, the court below was asked to take judicial notice of a British Statute exempting from liability for losses occasioned by the negligence of the servants of the steamship company. The court refused to do so and the Supreme Court sustained it in so doing and said:

"The law of Great Britain since the Declaration of Independence is the law of a foreign country and like any other foreign law, is matter of fact, which the courts of this country cannot be presumed to be acquainted with or to have judicial knowledge of, unless it is pleaded and proved.

The rule that the courts of one country cannot take cognizance of the law of another without plea and proof has been constantly maintained, at law and in equity, in England and America. * * *

The rule is as well established in courts of admiralty as in courts of common law or courts of equity."

And in the case of the Scotland, 105 U. S., 24, 29 (1881) Mr. Justice Bradley said:

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298 "If a collision should occur in British waters, at least between British ships and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the rights and liabilities of the parties were concerned, provided it were shown what that law was. If not shown, we would apply our own law to the case."

The Supreme Court, as these extracts from its opinions show, does not recognize any duty in the Admiralty Court to ascertain and apply the foreign law in fixing the liability of foreign vessels responsible for a collision where the foreign State has by statute changed the rule of the general maritime law. Such statutory limitation must be "shown" to the court and not taken judicial notice of and it must be "shown" as any other fact is shown, by proper evidence. As the foreign law was not pleaded and no evidence of it was introduced the court had no alternative but to follow the rule of the forum.

We do not wish, however, to be understood as intimating in what we have said that even if the foreign law had been pleaded the court could have assessed the damages according to the principle adopted by statute in Great Britain and in Germany. Whether it could or could not have done so is not now before us. And we do not find it necessary under the facts disclosed in the present record to consider how the decision of the Supreme Court in The Oceanic Steam Navigation Company, Limited vs. Mellor, announced May 25th, 1914, and not yet reported, affects the question.

Decree affirmed.

299 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, Held at the Court-rooms in the Post Office Building in the City of New York, on the 20th Day of June, One Thousand Nine Hundred and Fourteen.

Present: Hon. E. Henry Lacombe, Hon. Henry G. Ward, Hon. Henry Wade Rogers, Circuit Judges.

YANG-TSZE INSURANCE ASSOCIATION et al., Libellants-Appellees,
vs.
FURNESS, WITHY & COMPANY, LTD., Respondent-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with interest and costs.

H. W. R.

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It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

300 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. Yang-Tsze Ins. Co. vs. Furness, Withy & Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed June 23, 1914. William Parkin, Clerk.

301 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 300, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Yang-Tsze Insurance Association, et al., against Furness, Withy & Co., Ltd., as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 15th day of September, in the year of our Lord One Thousand Nine Hundred and Fifteen, and of the Independence of the said United States the One Hundred and Fortieth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 9/15/15.]

[Seal of the Supreme Court of the United States.]

302 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Furness, Withy and Company, Limited, is Appellant, and Yang-Tsze Insurance Association, Limited, et al, are Appellees, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do
303 hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

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Witness the Honorable Edward D. White, Chief Justice of the United States, the sixteenth day of June, in the year of our Lord One Thousand Nine Hundred and Fifteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

304 [Endorsed:] File no. 24,665. Supreme Court of the United States, October Term, 1914. No. 921. Furness, Withy & Co., Limited, vs. Yang-Tsze Insurance Association, Limited, et al. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 28, 1915. William Parkin, Clerk.

305 [Endorsed:] File No. 24,665. Supreme Court U. S. October term, 1915. Term No. 428. Furness, Withy & Company, Limited, Petitioner, vs. Yang-Tsze Insurance Association, Limited, et al. Writ of certiorari and return. Filed September 17, 1915.

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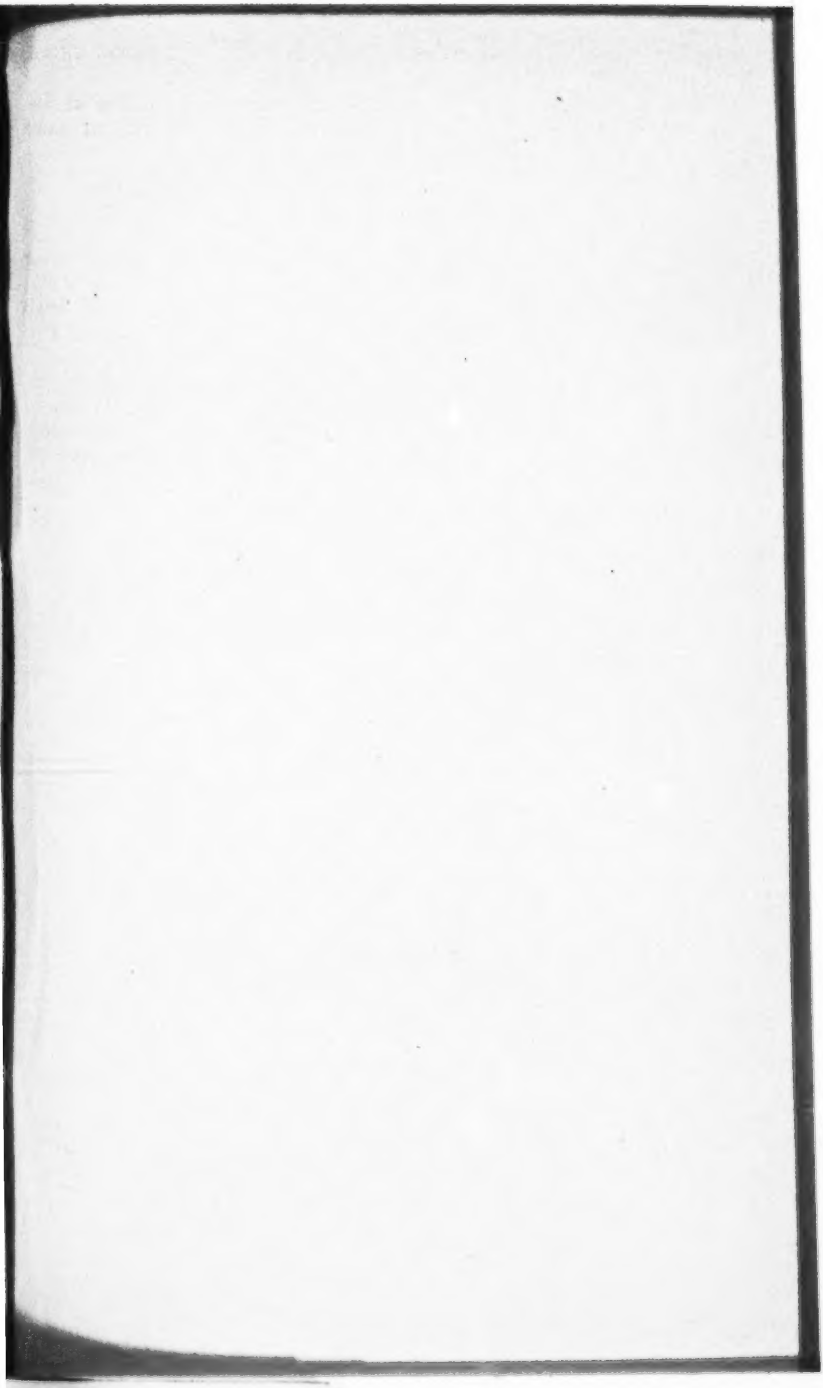

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SUPREME COURT OF THE
UNITED STATES.

FURNESS, WITHY & COMPANY, LTD., Petitioner, (Respondent below),	October Term 1916.	
AGAINST		
YANG-TSZE INSURANCE ASSOCIATION, LTD., *et. al.*, Respondents. (Libelants below.)	No. 106.	

NOTICE OF MOTION.

SIRS:

PLEASE TAKE NOTICE that the annexed motion to dismiss or affirm will be presented to the Supreme Court of the United States at ~~the opening of Court on Monday, December 11, 1916, or so soon thereafter as counsel may be heard, or if~~ the argument of the case ~~shall be heard before said date then this motion will be presented to the Court on the argument.~~

Dated, New York, December 9, 1916.

Yours, &c.,
J. PARKER KIRLIN,
LAWRENCE KNEELAND,
D. ROGER ENGLAR,
JOHN M. WOOLSEY,
Counsel for Respondents.

To:
CHARLES C. BURLINGHAM, ESQ..
NORMAN B. BEECHER, ESQ.,
Counsel for Petitioner.

SUPREME COURT OF THE
UNITED STATES.

FURNESS, WITHY & COMPANY, LTD., Petitioner, (Respondent below), AGAINST YANG-TSZE INSURANCE ASSOCIATION, LTD., *et. al.*, Respondents. (Libelants below.)	October Term 1916. No. 106.

MOTION TO DISMISS OR AFFIRM.

Now come the respondents by their counsel and move to dismiss the writ of *certiorari* heretofore granted herein by this Court on June 14, 1915, or to affirm the judgment herein.

(a) On the annexed affidavit and on the annexed certified copy of the record of the case in the United States District Court for the Southern District of New York entitled *In the Matter of the Petition of Furness, Withy & Company, Ltd., as Owner of the Steamship Pomaron for Limitation of its Liability,* (hereinafter referred to as the Limitation Proceedings), which involved the same subject-matter as the present case, and in which all the parties before this Court in the present case, together with others, entered into a compromise in which a decree was entered by consent in the United States District Court aforesaid, and

(b) On the Transcript of the Record of this case.

The reason for this motion is that this case which hereinafter will be referred to as the Collision Case, is now dead because the claims involved herein have been finally compromised and settled between the parties, and the respondents have been released and discharged of all liability therefor.

The Collision Case, here pending, was brought by fifteen parties, interested as owners or insurers of cargo on the steamship *Alleghany* of the Hamburg-American Line, to recover damages for the total loss of that cargo due to the sinking of the steamship *Alleghany* by the steamship *Pomaron* owned by Furness, Withy & Company, Ltd., the petitioner here and respondent below, in a collision off the Coast of Virginia on February 2, 1912.

The vessels were held both to blame in the District Court of the United States for the Southern District of New York. The Circuit Court of Appeals for the Second Circuit affirmed this decision.

The total recovery of the libelants in this Collision Case amounted to $171,930.81 with interest and costs of appeal.

Furness, Withy & Company, Ltd., claimed that the value of the steamship *Pomaron* and her pending freight at the time of the collision was $70,419.14, for which it had given bond in the Collision Case.

Other claimants came forward after the judgment and decree was entered on the decision of the Court of Appeals who were not entitled to participate in the bond given in the Collision Case, but who could prove claims for which, under the decision of that case, Furness, Withy & Company, Ltd., as owner of the steamship *Pomaron*, was liable.

Prior to any determination of the issues presented in the said Limitation Proceedings, and prior to the determination of the amount of the petitioner's interest in said steamship *Pomaron* and her pending freight, an agreement was reached among all the parties to the said Limitation Proceedings, among whom were a number of parties who are not before the Court in the Collision Case, whereby all the issues pending between the various parties in the Limitation Proceedings were settled and compromised, including the amounts at which the claims of the new parties should be fixed.

Thereupon, under circumstances more fully set forth in the annexed affidavit, and in the annexed Record of the Limitation Proceedings, by agreement of all the parties, a decree, embodying the terms of the said compromise and expressly reciting that it was entered as a result of the said settlement and compromise, was duly entered in the said United States District Court for the Southern District of New York on the consents of all the several parties, and on motion of Messrs. Burlingham, Montgomery & Beecher, proctors for Furness, Withy & Company, Ltd., the petitioner in the Limitation Proceedings, and respondent in the Collision Case.

By said decree Furness, Withy & Company, Ltd., was granted a limitation of its liability on payment of an agreed sum into Court, and pursuant to the said decree the amounts agreed to be paid to the various claimants in the Limitation Proceedings were fixed. Thereafter these amounts were duly paid and receipts and discharges in full were duly given by the various claimants, whereby all the damages suffered by

the claimants were finally settled and compromised with Furness, Withy & Company, Ltd., and among themselves, and the steamship *Pomaron* and Furness, Withy & Company, Ltd., were discharged from any other or further liability in the premises in any Court of any country or jurisdiction.

This case, therefore, does not present any actual controversy between the parties thereto and its prosecution by Furness, Withy & Company, Ltd., involves an endeavor on its part to have this Court decide what has become merely a moot or academic question.

Dated, New York, December 7, 1916.

J. Parker Kirlin,
Lawrence Kneeland,
D. Roger Englar,
John M. Woolsey,
Counsel for Respondents.

To:

Charles C. Burlingham, Esq.,
Norman B. Beecher, Esq.,
Counsel for Petitioner.

21 SUPREME COURT OF THE
UNITED STATES.

FURNESS, WITHY & COMPANY, LTD., Petitioner, AGAINST 22 YANG-TSZE INSURANCE ASSOCIATION, LTD., *et. al.*, Respondents.	October Term 1916. No. 106.

AFFIDAVIT.

STATE OF NEW YORK,
County of New York, } ss.:

JOHN M. WOOLSEY, being duly sworn, deposes
23 and says:

1. I am a member of the firm of Kirlin, Woolsey & Hickox, proctors for Yang-Tsze Insurance Association, Ltd., *et al.*, and I was a member of the firm of Converse & Kirlin to whose business my present firm is the successor. I have knowledge of the proceedings had herein and also in the limitation of liability proceeding brought by Furness, Withy & Co., Ltd., as hereinafter set forth.

24 2. On June 12, 1913, after full hearing and due consideration by the District Court, a final decree was entered entitled in *Yang-Tsze Insurance Association, Ltd., et al., against Furness, Withy & Company, Ltd., and fourteen other cases*, in all of which Furness, Withy & Company, Ltd., was the respondent, and various owners or insurers of cargo on the steamship *Alleghany* were libelants, in which recoveries of the damages suffered

by the libelants by reason of the sinking of the steamship *Alleghany* in the collision mentioned in the foregoing notice of motion, were severally awarded to the libelants against Furness, Withy & Company, Ltd., as owner of the steamship *Pomaron*. *Transcript of Record*, pp. 160-164.

3. An appeal was taken from this decree in behalf of Furness, Withy & Company, Ltd., on June 18, 1913. *Transcript of Record*, pp. 164-166.

4. The appeal duly came on to be argued in the Circuit Court of Appeals for the Second Circuit on March 20, 1914, and on June 10, 1914, the said Circuit Court of Appeals handed down an opinion affirming the decision below. Thereafter, on June 20, 1914, a decree affirming the decree of the District Court, with interest and costs, was entered in the said Circuit Court of Appeals.

5. Thereafter, in pursuance of the said decree of affirmance a mandate was issued by the Circuit Court of Appeals to the United States District Court for the Southern District of New York and duly filed therein and made the judgment of the said District Court, and on October 2, 1914, a decree and judgment on mandate was entered in the United States District Court for the Southern District of New York affirming the original decree of the District Court and providing for the recovery of the amounts awarded under the original decrees of the District Court, to wit: $171,930.81 with interest and the costs of the appeal.

6. The situation, therefore, was that there was

a judgment against Furness, Withy & Company, Ltd., in the sum of $171,930.81 with interest and costs entered on a mandate of the Circuit Court of Appeals in the Collision Case, when Furness, Withy & Company, Ltd., began the Limitation Proceeding, as hereinafter set forth, in an effort to cut down its liability to the value of the steamship *Pomaron* and her pending freight after the collision, which is claimed amounted to a total of only $70,419.14.

7. Three days after the entry of the decree on mandate aforesaid in the United States District Court for the Southern District of New York, namely, on October 5, 1914, a petition was filed in said District Court by Furness, Withy & Company, Ltd., as owner of the steamship *Pomaron*, for a limitation of its liability, wherein it was prayed that the Court should appraise the value of the petitioner's interest in the steamship *Pomaron* and her pending freight for the voyage on which the collision happened; that the Court should make an order directing the petitioner to file a stipulation with approved surety for the payment into Court of the petitioner's interest as found; that the Court should make the usual orders for monition and injunction according to the practice in limitation proceedings, and that the Court should adjudge that the petitioner was not liable to any extent for any damage or injury arising out of the collision, or if the petitioner should be adjudged liable, then that its liability should be limited to the amount of the value of the petitioner's interest in the steamship *Pomaron* and her freight at the end of the voyage on which she was engaged at the time of the collis-

ion, and that the fund representing that value should be divided *pro rata* among such claimants as might duly prove their claims in the Limitation Proceeding. *Record in Limitation Proceeding,* pp. 1-7. A certified copy of the Record of the United States District Court for the Southern District of New York in the Limitation Proceeding is hereto annexed and hereby made part of this affidavit.

8. Immediately thereafter, the petitioner, Furness, Withy & Company, Ltd., took the steps necessary to comply with the practice in limitation proceedings obtaining in the United States District Court for the Southern District of New York and, by filing a temporary or *ad interim* bond, secured an injunction whereby all actions against the petitioner for claims arising out of or connected with the collision between the steamship *Pomaron* and the steamship *Alleghany* and the subsequent sinking of the steamship *Alleghany* were stayed and restrained, except in the Limitation Proceeding, until the hearing and determination thereof. *Limitation Record,* pp. 16-19.

9. The said injunction order was duly served on the proctors for the various libelants in the collision case. Therefore, further proceedings looking towards execution on the decree on mandate entered in the District Court as aforesaid were, and since have been, stayed and prevented.

10. Thereafter, the petitioner gave public notice by advertisement, as required by the prac-

37 tice in limitation proceedings, and as provided in the injunction order aforesaid, and all persons in interest were commanded to make proof of their respective claims before Alexander Gilchrist, Jr., Esq., a Commissioner, at his office in the Post Office Building, New York City, on or before January 18, 1915, at 10.30 o'clock in the forenoon.

38 11. In pursuance of this public notice claims were filed by the several libelants in the collision case, and also by a number of other claimants who had not previously taken any proceedings against the petitioner. *Cf.* List of Libellants on page 160 in the *Transcript of Record* in this case and Commissioner's Report giving List of Claimants, pp. 57-59 of the annexed *Record of the* 39 *Litigation Proceedings.*

12. On the 18th day of January, 1915, an order of default against all persons who had not filed claims in the Limitation Proceedings was entered in the United States District Court for the Southern District of New York. By this order the parties to the Limitation Proceedings entitled to participation in the fund representing the steamship *Pomaron* and her freight became 40 fixed. *Record of Limitation Proceedings,* pp. 55-56.

13. On April 12, 1915, the petitioner, Furness, Withy & Company, Ltd., applied to this Court for a writ of *certiorari* to the Circuit Court of Appeals for the Second Circuit. This application was Docket Number 921 of the October Term, 1914, of this Court. This petition was de-

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nied by this Court on April 19, 1915. 238 U. S., p. 625.

14. Thereafter, pursuant to negotiations which had been pending between the proctors for the various parties to the Limitation Proceedings, an agreement of settlement and compromise was reached whereby it was agreed that the petitioner should surrender the amount stated by its 42
own surveyors and employes to be the value of the steamship *Pomaron* after collision with the steamship *Alleghany* and her pending freight, with interest added and also the sum of $9,496.19, being the amount recovered by Furness, Withy & Co., Ltd., from the owners of the steamship *Alleghany* with interest, to wit, the total sum of $93,514.90; that the petitioner should thereupon be granted a limitation of its litbility to the said 43
amount without any opposition by any of the claimants; that all bonds and stipulations for value and costs given by the petitioner for the payment of money into Court should be deemed fulfilled, satisfied and canceled forthwith; and that the money surrendered and deposited by the petitioner should be divided into certain proportions among the various claimants, which proportion had been the subject of negotiation and agreement between the various claimants them- 44
selves. The agreement so arrived at among the various counsel interested was embodied in the form of a final decree in the Limitation Proceedings entered April 22, 1915, which recited on its face that it was entered pursuant to a compromise and settlement of the issues between the petitioner and all the claimants, and this decree was thereupon entered by consent of all the parties. *Limitation Record*, p. 186.

15. There was not any appraisal of the petitioner's interest in hull and freight had in the Limitation Proceedings. It was part of the compromise among the parties to those proceedings that the values placed upon the vessel and freight by the petitioner's employes should be accepted as the value of the petitioner's interest in the vessel and freight at the time of the collision.

16. Pursuant to this decree of compromise and settlement consented to in the Limitation Proceeding, the petitioner, Furness, Withy & Company, Ltd., paid in the amount agreed on to the Clerk of the Court, and the Clerk of the Court, in pursuance of the provision of the decree, paid out to the several participating claimants their ratable share of the sum so paid in by the petitioner, and each claimant, as required by the decree, executed a receipt for the sum so received discharging the steamship *Pomaron*, her owners and charterers from liability in respect of the collision with the steamship *Alleghany* and renouncing any and every right of action or suit other than the right in the Limitation Proceeding against the steamship *Pomaron*, her owners and charterers, in law or in admiralty in any Court of any country or jurisdiction. *Limitation Proceeding*, hereto annexed, pp. 183-184.

17. Thereafter, on or about May 17, 1915, Messrs. Burlingham, Montgomery & Beecher, who had acted as proctors for Furness, Withy & Company, Ltd., in both the proceedings hereinbefore mentioned, served a notice on the proctors for the several libelants in the original

suits in which the liability of the steamship *Pomaron* had been adjudged, that they would present a second petition for a writ of *certiorari* to this Court on June 1, 1915. This petition was duly presented and the order of April 19, 1915, denying the first petition for a writ of *certiorari* was vacated and set aside by this Court, and a writ of *certiorari* to the Circuit Court of Appeals for the Second Circuit was granted on June 14, 1915. 238 *U. S.*, pp. 625, 634.

18. Prior to the granting of the said writ, all the money deposited with the Clerk of the Court by the petitioner had been paid out to the respective claimants and their proctors and the receipts and discharges required under the decree had been given to the Clerk by the several claimants or their proctors. *Limitation Record,* pp. 194-201.

19. Deponent is informed and believes that a large part of the money so paid over has been transmitted by the proctors who received the same to clients in foreign countries, among which are Switzerland and Germany. Jurisdiction over many of these parties could not now be obtained in the United States.

20. There was not any money paid by Furness, Withy & Company, Ltd., under the original decree of the District Court in these proceedings, or under the decree entered on the mandate of the Circuit Court of Appeals, when the decree of the District Court was affirmed. All the money paid to the respondents in the present

53 *Affidavit.*

case was paid to them after the aforesaid compromise which was embodied as aforesaid in the final decree in the Limitation Proceedings, and in pursuance of the final decree and the agreements recited therein.

21. On July 1, 1915, after this Court had granted a *certiorari* in the Collision Case, a
54 motion was made on an order to show cause by Furness, Withy & Company, Ltd., in the Limitation Proceeding that the decree entered therein by unanimous consent on April 22, 1915, should be opened and vacated, amended and corrected and the Limitation Proceeding continued until this Court had rendered its decision on the writ of *certiorari* which is now pending in this Court, and which had been granted on June
55 14, 1915, and that, in the event of a reversal or modification of the decision of the Circuit Court of Appeals, restitution should be decreed to the petitioner, Furness, Withy & Company, Ltd., of the moneys paid by it in compromise under the final decree of April 22, 1915, in the Limitation Proceeding.

22. This motion was opposed by counsel for the claimants who filed affidavits setting forth
56 that the amounts severally due the claimants had been paid out by the Clerk of the Court to them in pursuance of the decree of April 22, 1915, and that they, in turn, had remitted the amounts to their several clients less their disbursements and appropriate charges for fees, and that the case was entirely at an end, both so far as concerned the Limitation Proceeding and the accounting between the claimants and their

respective attorneys for the amounts received in settlement thereof.

23. An order was entered by one of the District Judges on this motion, providing

"That no decision be made on the question of the sufficiency of the service herein or the merits of this motion at the present time, nor until the United States Supreme Court shall have rendered its decision on the aforesaid writ of *certiorari* to the Circuit Court of Appeals for the Second Circuit, granted June 16, 1915, and that the term of this Court for all purposes of the relief sought by the petitioner herein be, and it hereby is extended until the aforesaid decision of the United States Supreme Court and until appropriate action thereunder by the Circuit Court of Appeals and by this Court."

It was further ordered that the motion made should be continued until the further order of the District Court.

24. The contention of the claimants at the time of the motion for a continuance of the Limitation Proceeding, and ever since, has been that under the circumstances the District Judge was without jurisdiction to disturb, modify or vacate a decree embodying a compromise agreement which had been entered on the consent of all the parties to a proceeding, and further that as the writ of *certiorari* was granted in the Collision Case, which was an entirely independent and separate case from the Limitation Proceeding in which there were other parties involved, that the compromise and settlement of the Limitation Proceeding could never, in any way, be

61 *Affidavit.*

affected by a decision in the Collision Case by this Court.

25. Your deponent submits, therefore, that as a result of the decree of compromise and settlement entered by consent as aforesaid in the Limitation Proceedings, a certified copy of which
62 in hereto annexed, and the actual payment of the amounts agreed upon and set forth in the said decree, there is no controversy between the parties to the original suits which are before this Court under the writ of *certiorari* granted as aforesaid on June 14, 1915, and further submits that this Court should dismiss the writ of *certiorari* or affirm the judgment of the District Court of the United States entered herein on June 12, 1913, as aforesaid, or grant to the re-
63 spondents, Yang-Tsze Insurance Association, Ltd., *et al.*, such other or further relief as may be just in the premises.

JOHN M. WOOLSEY,

Sworn to before me this 9th day of December, 1916.

(Seal.)

CLETUS KEATING,
Notary Public, No. 33,
New York County.

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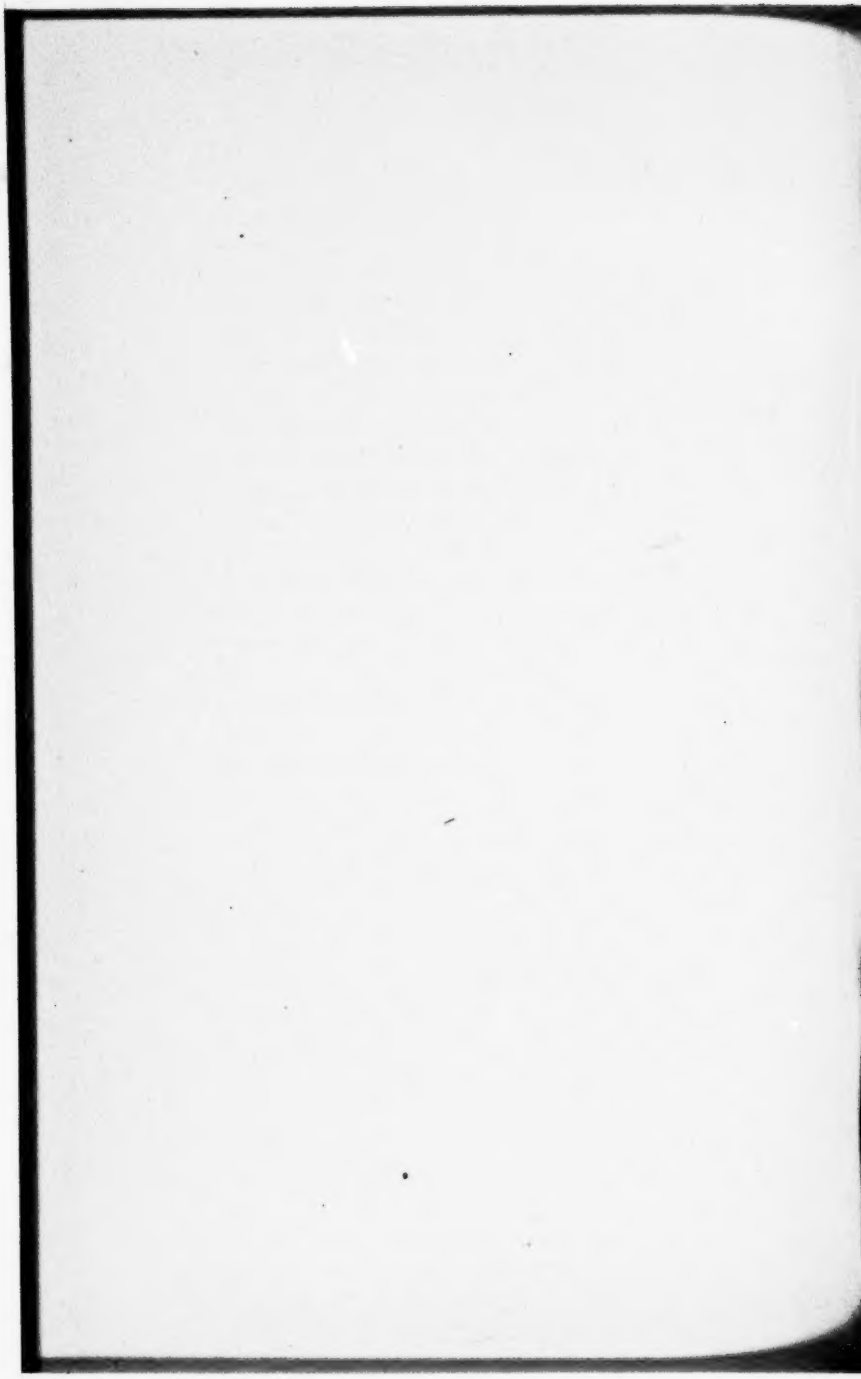

Petition.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The petition of Furness, Withy & Company, Limited, owner of the steamship *Pomaron*, in a cause of limitation of liability, civil and maritime, alleges as follows:

FIRST: The petitioner is a British corporation and operates a line of cargo steamships between European and American ports and has an office for the transaction of business within this District. At the times hereinafter mentioned the petitioner was the sole owner of the steamship *Pomaron*, which is a steel screw vessel of 1809 tons gross, 1127 tons net, 278 feet long, 40.5 feet beam, and 20.5 feet depth of hold.

The petitioner had used due diligence to make said vessel seaworthy, and until the accident hereinafter mentioned said steamship was in fact tight, staunch, strong and in all respects seaworthy.

SECOND: On February 1, 1912, the *Pomaron* left Baltimore, bound for Leith, laden with grain and general cargo. She was under the command of an experienced master, and was fully and efficiently manned, equipped and supplied in conformity with the laws of the United States.

All went well until about 11:15 A. M. of February 2, 1912, when in about 37°32′ N. latitude and 74° W. longitude, she collided with and sank the steamship *Alleghany*. The *Alleghany*, her cargo, the personal effects of the crew, and everything connected with the vessel became a total loss with the exception of two of the *Alle-*

5 *ghany's* lifeboats, which were transported by the *Pomaron* into the port of Norfolk. No lives were lost.

THIRD: The facts and circumstances of said collision and the resulting loss and damage are as follows: On February 1, 1912, the *Pomaron* left Baltimore, bound for Leith. She passed
6 Cape Henry between midnight and 1 A. M. of February 2, 1912, and set a course E. by N. ¼ N. magnetic, her compass course being E. by N., which course she maintained until just before the collision. The weather was fine and clear, and the wind a moderate breeze from the west. The *Pomaron* was making about 9 knots an hour.

About 10:35 A. M. the first officer of the *Pomaron,* who was on the bridge in charge of
7 her navigation, sighted on the port bow a steamship distant about 10 miles, which was apparently steering a course about south. The bearing of this vessel, which proved to be the *Alleghany,* did not change as she approached but the *Pomaron* kept her course and speed until she saw that the *Alleghany* was doing nothing whatever to keep out of the way of the *Pomaron.* The first officer of the *Poramon,* therefore, blew one blast of his whistle and at the same time ordered
8 the helm a little to port. Shortly afterwards the *Alleghany* suddenly blew a signal of two blasts indicating that she was directing her course to port with the intention of crossing the *Pomaron's* bows. Seeing that a collision was inevitable, the first officer of the *Pomaron* ordered the engines full speed astern and the helm put hard aport in an effort to ease the blow. The *Alleghany* kept on at full speed across the *Pom-*

aron's bows, at the last moment swinging apparently under a starboard helm, and the vessels came together, the *Pomaron's* stem striking the *Alleghany* a glancing blow on her starboard side abaft the engine room. The way of the *Pomaron* was almost checked at the time of the collision, but the *Alleghany* was swinging rapidly to port and went on at full speed for some distance. The *Pomaron* stood by to render assistance and took all the crew and passengers on board when it was found that the *Alleghany* was sinking. 10

FOURTH: The collision aforesaid and the loss, damage, injury and destruction resulting therefrom were occasioned and incurred without the privity or knowledge of the petitioner, and were not caused or contributed to by any negligence on its part or on the part of those in charge of the steamship *Pomaron,* but were due solely to the negligence of the steamship *Alleghany* and those in charge of her in the following respects, among others: 11

1. In that a good lookout was not maintained.

2. In that there was no officer or any competent person in charge of her navigation for some time prior to the collision. 12

3. In that although she had the *Pomaron* on her starboard hand she did not keep out of the way of the *Pomaron.*

4. In that she made no change of course until too late to avoid a collision.

5. In that she starboarded her helm, and attempted to cross the *Pomaron's* bows.

13 *Petition.*

6. In that she did not port her helm or stop and reverse in time to avoid a collision.

7. In that she did nothing to avoid a collision.

FIFTH: Proceedings have already been brought against the petitioner for damages alleged to have been sustained by reason of the loss of the
14 steamship *Alleghany*, her cargo, personal effects and equipment, as follows:

In the United States District Court for the Southern District of New York, by

Eugene J. F. Coleman for loss of cargo;
Marshall K. Weidensaul for loss of cargo;
Francis W. Van Praag for loss of cargo;
Orton G. Orr for loss of cargo;
Laura Moore for loss of cargo;
Louis Bertschmann for loss of cargo;
15 M. H. Silvera for loss of cargo;
Federal Insurance Company for loss of cargo;
Nord Deutsche Insurance Company for loss of cargo;
Yang-Tse Insurance Company, Ltd., *et al.*, for loss of cargo;
Boston Insurance Company for loss of cargo;
16 Hamburg-Amerikanische Packet-Fahrt-Actien-Gesellschaft (Hamburg American Line) for loss of the steamship *Alleghany* and equipment;
United States of America for loss of mail;
Gerhard Arlt for loss of personal effects of the officers and crew of the Alleghany.

The petitioner expects that other claims will be presented against it and that other suits will be begun by persons who sustained loss by reason

of said collision. The demands already made against the petitioner in behalf of the various claimants amount to more than $200,000. 17

SIXTH: The steamship *Pomaron* was damaged to the extent of $15,610. The value of the steamship *Pomaron* at the termination of said voyage after the collision with the *Alleghany* amounted to the sum of $64,389.77. The freight earned by the *Pomaron* on said voyage amounted to the sum of $6,029.37, making the value of petitioner's interest in the *Pomaron* and her pending freight $70,419.14. 18

SEVENTH: On or about February 29, 1912, the petitioner duly executed a stipulation for value in the sum of $70,500 with good and sufficient surety, as security for the claims of the libellants Hamburg American Line and Yang-Tse Insurance Company, Ltd., and claims which any other persons might have against the steamship *Pomaron* and her owners, which stipulation for value was approved by Messrs. Haight, Sandford & Smith, proctors for the Hamburg American Line; Messrs. Convers & Kirlin, proctors for certain cargo interests; Messrs. Harrington, Bigham & Englar, proctors for certain cargo interests; and Messrs. Kneeland, Harison & Hewitt, proctors for certain cargo interests. 19 20

EIGHTH: The petitioner desires to contest its liability as owner of the steamship *Pomaron* for the loss, destruction, damage and injury occasioned or incurred by the collision with the said steamship *Alleghany* (independently of the limitation of liability hereinafter claimed) and also to claim the benefit of the limitations of liability provided for in Sections 4283, 4284 and 4285 of

the Revised Statutes of the United States, and the various statutes supplementary thereto and amendatory thereof, and to that end the petitioner is ready and willing to give a stipulation with sufficient surety for the payment into Court of the amount or value of the petitioner's interest in the steamship *Pomaron* and her pending freight, whenever the same shall be ordered by this Court, as provided by the aforesaid statutes, by Rule 54 in Admiralty, and by the rules and practice of this Court.

NINTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, the petitioner prays:

1. That the Court cause due appraisement to be made of the amount or value of its interest in the steamship *Pomaron* and of her pending freight for the aforesaid voyage.

2. That the Court make an order directing the petitioner to file a stipulation, with surety to be approved by the Court, for the payment into Court of the amount of the petitioner's said interest, whenever the Court shall so order.

3. That the Court make an order directing the issuance of a monition to all persons claiming damages for any loss, damage or injury caused or resulting from the collision aforesaid, citing them to appear before a Commissioner to be named by the Court in said order, and make due proof of their respective claims, and also to appear and answer the allegations of this petition at or before a certain time to be fixed by the monition.

4. That the Court make an order directing that, on the giving of such stipulation as may be determined to be proper, an injunction issue restraining the commencement, continuation or prosecution of any suit, action or legal proceeding of any nature whatever, except in the present proceeding, against the petitioner in respect of any claim or claims arising out of the aforesaid accident.

5. That the Court in this proceeding adjudge that the petitioner is not liable to any extent for any loss, damage or injury, nor for any claim whatsoever in any way arising out of, or in consequence of the collision aforesaid; or, if the petitioner shall be adjudged liable, then that its liability be limited to the amount or value of the petitioner's interest in the steamship *Pomaron* at the end of the voyage on which she was engaged at the time of said accident, and her pending freight, and that the moneys paid or secured to be paid as aforesaid be divided *pro rata* among such claimants as may duly prove their claims before the Commissioner hereinbefore referred to, saving to all parties any priorities to which they may be legally entitled and that a decree may be entered discharging the petitioner from all further liability.

6. That the petitioner have such other or further relief as the justice of the cause may require.

FURNESS, WITHY & COMPANY, LIMITED,
By H. C. Blackiston, U.S. Manager

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Petitioner.

Petition.

SOUTHERN DISTRICT OF NEW YORK,
County of New York, } ss.:

H. C. BLACKISTON, being duly sworn, says: I am the U. S. Manager of Furness, Withy & Company, Limited, the petitioner herein. The foregoing petition is true to the best of my knowledge, information and belief. The sources of my knowledge and information are statements made by the officers and crew of the steamship *Pomaron*, investigations which I have caused to be made concerning the subject matter of this petition, and information which I have acquired in the course of my duties as U. S. Manager of the petitioner. The reason this verification is not made by petitioner is that it is a foreign corporation.

H. C. BLACKISTON.

Sworn to before me, this
3rd day of October, 1914.

ADELINE K. SCHNEIDER,
[SEAL] Notary Public No. 3436,
New York County.

Register No. 6209.
Commission expires March 30, 1916.

[Endorsed:] — District Court of the United States, Southern District of New York—In the Matter of the Petition of Furness, Withy & Co., Ltd., for Limitation of its Liability as owner of the steamship *Pomaron*—Petition—Burlingham, Montgomery & Beecher, Proctors for Petitioner, 27 William Street, Borough of Manhattan, New York City—Filed October 5, 1914.

Affidavit of Value. 33

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of its Liability as owner of the steamship "POMARON."	Affidavit of Value. 34

SOUTHERN DISTRICT OF NEW YORK, County of New York, } ss.:

CHARLES E. ROSS, being duly sworn, says: 35

1. I am a marine surveyor of 25 years' experience, and know the value of steamships of the class of the steamship *Pomaron* and equipment, owned by Furness, Withy & Company, Limited. I surveyed the steamship *Pomaron*, and examined her equipment at the request of Furness, Withy & Company, Limited, on the 20th day of February, 1912, after repairs had been made as a result of a collision with the 36 steamship *Alleghany*.

2. The actual value of said steamship *Pomaron* in the condition in which said steamship was at the time I made said survey on February 20th, 1912, was, in my opinion, $80,000.

3. In my opinion, the value of the steamship *Pomaron* and her equipment as of February 2,

37 *Affidavit of Value.*

1912, was $80,000., less the cost of repairs necessitated by the collision with the *Alleghany*.

CHAS. E. ROSS.

Sworn to before me, this 14th day of September, 1914.

CHAUNCEY I. CLARK,
[SEAL] Notary Public,
38 Kings County.

Certificate filed in New York County.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

39

In the Matter of The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of its Liability as owner of the steamship "POMARON."	Affidavit of Value.

40

SOUTHERN DISTRICT OF NEW YORK, County of New York, } ss.:

HERBERT C. MILLICAN being duly sworn, says: I am agent at New York, of Furness, Withy & Company, Limited, the petitioner herein. The petition herein is filed to limit the liability of Furness, Withy & Company, Limited, as owner of the steamship *Pomaron* in respect of any

claims or suits against it or the steamship *Pomaron* arising out of or in any way connected with the collision between said steamship *Pomaron* and the steamship *Alleghany* on February 2, 1912, in consequence of which the *Pomaron* was seriously damaged and the *Alleghany* sank on the same day and became a total loss, nothing being saved from the wreck except two lifeboats and their equipment.

The *Pomaron,* since the above collision, has been within the jurisdiction of this Court, and a stipulation for value in the sum of $70,500., approved by the proctors for the various claimants, has been filed in this Court to respond for petitioner's liability in the various suits instituted by the owners of the *Alleghany* and her cargo.

An appraisal of the steamship *Pomaron* and her equipment has been made by John H. Marsden, surveyor to Lloyds Register of Shipping, and Charles E. Ross, consulting surveyor, who have reported the value thereof as of February 2, 1912, to be $80,000., less the cost of necessary repairs, which I verily believe to be the true value.

After the collision between the *Pomaron* and the *Alleghany* a survey was held of the damages sustained by the *Pomaron,* and repairs were made at Newport News, Virginia, which cost the sum of $15,610.23.

The freight moneys earned by the *Pomaron* on said voyage from Baltimore to Leith, Scotland, when the collision occurred amounted to $6,029.37. There were no passage moneys. The entire aggregate value of the interest of the petitioner in said steamship *Pomaron* and her

45 *Affidavit of Value.*

pending freight does not exceed the sum of $70,419.14.

HERBERT C. MILLICAN.

Sworn to before me, this 15th day of September, 1914.

CHAUNCEY I. CLARK,
Notary Public,
46 Kings County.

Certificate filed in New York County.

LLOYD'S REGISTER OF SHIPPING,

Head Office: 71, Fenchurch Street, London, E. C.

(Seal.) Port Newport News, Virginia,

February 20th, 1912.

47 THIS IS TO CERTIFY that JOHN H. MARSDEN the undersigned Surveyor to this Society did at the request of the Owners, and Chas. E. Ross, Consulting Surveyor, did also at the request of the Owners, make examination of the steel S. S. *Pomaron* after repairs had been carried out at Newport News, and with the vessel in loaded condition, and we estimate the value of the vessel at the sum of eighty thousand dollars
48 ($80,000.).

(Sgd.) JOHN H. MARSDEN,
Surveyor to Lloyd's,
Register of Shipping.

(Sgd.) CHAS. E. ROSS,
Consulting Surveyor.

This Certificate is issued upon the terms of the Rules and Regulations of the Society, which provide that:

"While the Committee use their best endeavors to ensure that the functions of the Society are properly executed, it is to be understood that neither the Committee nor the Society are under any circumstances whatever to be held responsible for any inaccuracy in any report or certificate issued by the Society or its Surveyors, or in any entry in the Register Book or other publication of the Society, or for any error of judgment, default or negligence of the Surveyors, or other Officers or Agents of the Society."

[Endorsed:]—District Court of the United States, Southern District of New York—In the Matter of the Petition of Furness, Withy & Company, Ltd., for Limitation of its liability as owner of the steamship *Pomaron*—Copy, Certificate and Affidavits of Value—Burlingham, Montgomery & Beecher, Proctors for Petitioner, 27 William Street, Borough of Manhattan, New York City—Filed, Oct. 8th, 1914.

53 *Notice.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

54 of

The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of its Liability as owner of the steamship "POMARON."

SIRS:

PLEASE TAKE NOTICE that the within are copies
55 of an order for appraisal and for proof of claims, issuance of monition and injunction, made and entered herein October 8, 1914, and a monition issued herein October 9, 1914, and that the same are served upon you pursuant to the aforesaid order of October 8, 1914.

Dated, New York, October 10, 1914.

Yours, etc.,

56 BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Furness, Withy & Co., Ltd.,
Petitioner.

Notice. 57

To:

Messrs. Convers & Kirlin,
Proctors for Yang-tsze Insurance Association, Limited, *et al.* and Nord-Deutsche Insurance Co., *et al.*

Messrs. Kneeland, Harison & Hewitt,
Proctors for Federal Insurance Co., *et al.*

Messrs. Barry, Wainwright, Thatcher & Symmers, 58
Proctors for Walter Oloffson, *et al,* M. H. Silvera and Hazan & Co.

Messrs. Williams & Stevenson,
Proctors for Boston Insurance Co.

Messrs. Harrington, Bigham & Englar,
Proctors for Walter D. Despard, Eugene J. F. Coleman, Marshall K. Weidensaul, Frances W. Von Praag, Orton C. Orr, Laura Moore and Louis Bertschman. 59

H. Snowden Marshall, Esq.,
Proctor for United States of America.

60

61 *Order for Appraisal, etc.*

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Court Rooms, Borough of Manhattan, City of New York, on the 8th day of October, 1914.

62 Present—Hon. Charles M. Hough,
District Judge.

In the Matter of The Petition of Furness, Withy & Company, Limited, for Limitation of its Liability as owner of the steamship "Pomaron."	Order for Appraisal and for Proof of Claims, Issuance of Monition and Injunction.

63

A petition having been filed herein October 5, 1914, by Furness, Withy & Company, Limited, as owner of the steamship *Pomaron*, her engines, etc., claiming the benefit of the limitation of liability provided for in the third and fourth sections of the Act of Congress entitled, "An Act to
64 Limit the Liability of Shipowners and for other purposes," passed March 3, 1851, now embodied in Sections 4283, 4284 and 4285 of the Revised Statutes and the statutes supplemental thereto and amendatory thereof, and also contesting its liability independently of the limitation of liability claimed under said acts for any loss, damage, injury or destruction resulting from said steamship colliding with the steamship *Alleghany*,

and said petition also stating the facts and circumstances on which such exemption from and limitation of liability are claimed, and on reading and filing the certificate of John H. Marsden and Charles E. Ross, dated February 20, 1912, and the affidavits of Charles E. Ross and Herbert C. Millican, verified respectively September 14th and September 15th, 1914, as to the value of said steamship *Pomaron,* the cost of repairs made 66 necessary by the collision, and the amount of freight pending on the voyage in which she was engaged at the time of said collision, from which it appears that the amount or value of the interest of the petitioner in said steamship *Pomaron* and her freight pending at the termination of the voyage on which she was engaged at the time of said collision was $70,419.14;

Now, on motion of Burlingham, Montgomery & 67 Beecher, proctors for the petitioner, it is

ORDERED that the petitioner file with the Clerk of this Court a stipulation for value in the sum of $70,500 with good and sufficient surety for the payment of said sum of $70,500 into Court, with interest thereon from February 4, 1912, being the date of the termination of the voyage of the steamship *Pomaron* aforesaid; and it is

FURTHER ORDERED that unless exceptions be filed to the aforesaid provisional valuation of the *Pom-* 68 *aron* and her pending freight on or before Jan. 23, 1915, such provisional valuation shall stand as the appraisal by this Court of the amount or value of the interest of the petitioner in said steamship *Pomaron* and her pending freight; and it is

FURTHER ORDERED that on the filing of such stipulation a monition issue out of and under the seal of this Court against all persons claiming dam-

69 *Order for Appraisal, etc.*

ages for any and all losses, damages or injuries occasioned by or resulting from the collision between the steamship *Pomaron* and the steamship *Alleghany* on February 2, 1912, and the subsequent sinking of the steamship *Alleghany*, citing them to appear before this Court and make due proof of their respective claims on or before the 18th day of January, 1915, at 10:30 o'clock in
70 the forenoon, and Alex Gilchrist, Jr., Esq., is hereby appointed Commissioner, before whom proof of claims which shall be presented in pursuance of said monition shall be made, subject to the right of any person to controvert or question the same, with liberty also to any person or persons claiming damages as aforesaid, who shall have presented his or their claims to said Commissioner undr oath, to answer said petition; and
71 it is

FURTHER ORDERED that public notice of such monition be given by publication thereof in the Evening Mail, a newspaper published in the City of New York, once a day for fourteen days, the first publication to be at least three months before said return day, and that a copy of said monition be served on the respective attorneys or proctors of all persons who at the time of making this order shall have filed libels or begun suits for
72 damage or loss or injury occasioned by or arising out of the collision aforesaid, together with a copy of this order, such last mentioned service to be made at least thirty days before the return day; and it is

FURTHER ORDERED that the beginning or prosecution of any and all suits, actions or legal proceedings of any nature or description whatsoever in respect of any claim arising out of or connected

with the collision between the steamship *Pomaron* and the steamship *Alleghany* on February 2, 1912, and the subsequent sinking of said steamship *Alleghany* on the same day, be and hereby are stayed and restrained until the hearing and determination of this proceeding; and it is

FURTHER ORDERED that service of this order as a restraining order be made within this District in the usual manner and in any other District by the United States Marshal for such District delivering a certified copy of this order to the person or persons to be restrained, or to their respective proctors or attorneys.

C. M. HOUGH, D. J.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Petitioner.

[Endorsed:]—District Court of the United States, Southern District of New York—In the Matter of the Petition of Furness, Withy & Company, Limited, for Limitation of its Liability as Owner of the steamship *Pomaron*—Order for appraisal and for proof of claims, issuance of monition and injunction—Burlingham, Montgomery & Beecher, Proctors for Petitioner, 27 William Street, Borough of Manhattan, New York City—Received Oct. 13, 1914, Convers & Kirlin—A copy of the within paper has been this day received at this office Oct. 14, 1914, H. Snowden Marshall, U. S. Attorney—Filed Oct. 8, 1914.

77 *Stipulation for Value.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

78

The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of its Liability as owner of the steamship "POMARON."

Whereas, Furness, Withy & Company, Limited, as owner of the steamship *Pomaron,* has
79 instituted a proceeding in this Court for limitation of liability as such owner in respect of a collision with the steamship *Alleghany,* which occurred at sea February 2, 1912, and the loss and damage consequent thereon, as is more particularly set forth in its petition filed herein October 5, 1914, in which the petitioner prays, among other things, that the Court cause due appraisement to be made of the amount or value of its interest in said steamship *Pomaron* and her pend-
80 ing freight; and that an order be made directing the petitioner to file a stipulation, with surety to be approved by the Court, for the payment into Court of the amount of the petitioner's said interest whenever the Court shall so order; and that a monition may issue to all persons claiming damages for any loss, damage or injury caused by or resulting from the aforesaid collision, citing them to appear before a Commissioner to be

named by this Court and make due proof of their respective claims and to appear and answer the petition herein; and that an injunction issue restraining the commencement, continuation or prosecution of any unit, action or legal proceeding of any nature whatever, except in the present proceeding; and

Whereas, by an order entered herein October 8, 1914, this Court ordered that the petitioner 82 file with the Clerk of this Court a stipulation for value in the sum of $70,500, with good and sufficient surety for the payment of said sum of $70,500 into Court, with interest thereon from February 4, 1912;

Now, therefore, in consideration of the premises, The National Surety Company, having an office and place of business at 115 Broadway in the City of New York, hereby undertakes in 83 the sum of $70,500 that the petitioner, Furness, Withy & Company, Limited, will pay into Court at such time as the Court shall so order the amount or value of the petitioner's interest in the steamship *Pomaron* and her pending freight, with interest thereon from February 4, 1912, and that pending the payment into Court of said amount or value of the petitioner's interest in said steamship *Pomaron* and her pending freight, with interest as aforesaid, this stipula- 84 tion shall stand as security for all claims in said limitation proceeding. Said National Surety Company hereby submits itself to the jurisdiction of the Court and agrees to abide by all orders of the Court, interlocutory and final, and to pay the amount awarded by the final decree rendered by this Court, or by any Appellate Court if an appeal intervene, with interest, unless the

85 *Stipulation for Value.*

amount or value of the petitioner's interest in the steamship *Pomaron* and her pending freight, with interest as aforesaid, shall be paid into Court by the petitioner, in which event this stipulation shall be void.

FURNESS, WITHY & COMPANY, LIMITED,
By H. C. Blackiston, U. S. Manager.

86 NATIONAL SURETY COMPANY, [SEAL]
By Wm. A. Thompson,
Resident Vice President.

Taken and acknowledged as to Furness, Withy & Co., Ltd., this 8th day of October, 1914, before me,

ROSCOE H. HOPPER,
[SEAL] Notary Public,
87 New York County No. 1621.

Attest:

E. M. MCCARTHY,
Resident Assistant Secretary.

88

Stipulation for Value. 89

AFFIDAVIT, ACKNOWLEDGMENT, AND JUSTIFICATION BY GUARANTEE OR SURETY COMPANY

STATE OF NEW YORK,
County of New York, } ss.:

On this 8th day of October, one thousand nine hundred and ....., before me personally came 90
Wm. A. Thompson, known to me to be the Resident Vice-President of the NATIONAL SURETY COMPANY, the corporation described in and which executed the within and foregoing Bond of *S. S. Pomaron* as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said NATIONAL SURETY COMPANY, 91
is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of *S. S. Pomaron* is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the Board of Directors of said Company; that he signed his name thereto by like 92
order and authority as Resident Vice-President of said Company; that he is acquainted with E. M. McCarthy and knows him to be the Resident Assistant Secretary of said Company; that the signature of said E. M. McCarthy subscribed to said Bond is in the genuine handwriting of said E. M. McCarthy, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; that

the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of Two Million ($2,000,000) dollars.

That ..... is agent to acknowledge service for said Company in the Judicial District wherein this bond is given.

WM. A. THOMPSON.
(Deponent's Signature.)

Sworn to, acknowledged before me, and subscribed in my presence this 8th day of October, 1914.

PAUL P. MARCONE,
[SEAL] Notary Public, etc.
(Officer's Signature, description and seal.)

Notary Public for New York County, No. 2386.
Certificate filed in Kings, Queens, Bronx, Richmond and Westchester Counties.
New York County Register's Office No. 6239.
Kings County Register's Office No. 6099.
Bronx County Register's Office No. 632.
My commission expires March 30, 1916.

[Endorsed:] — 58-112 — District Court of the United States, Southern District of New York —In the Matter of the Petition of Furness, Withy & Co., Ltd., for Limitation of its Liability as owner of the S. S. *Pomaron*— Stipulation for Value—Burlingham, Montgomery & Beecher, Proctors for Petitioner, 27 William Street, Borough of Manhattan, New York City—Filed October 9, 1914— ~~R. H. D.~~

Approved Oct. 9. 1914 T. M. Mayo
A. G. J. D. J.

MONITION

97

THE PRESIDENT OF THE UNITED STATES OF AMERICA:

To the Marshal of the United States for the Southern District of New York, GREETING:

WHEREAS, a petition was filed in the District Court of the United States for the Southern District of New York on the 5th day of October, 1914, by Furness, Withy & Company, Limited, praying for a limitation of its liability as owner 98
of the steamship *Pomaron,* concerning the loss, damage, injury and destruction occasioned by or resulting from the collision between the steamship *Pomaron* and the steamship *Alleghany* on February 2, 1912, and the subsequent sinking of said steamship *Alleghany,* for the reasons mentioned in said petition, and praying that a monition issue out of said Court citing all persons claiming damages for any and all losses, damages or injuries 99
to appear before said Court and make due proof of their respective claims, and answer the allegations of said petition, and that if it shall appear that the petitioner is not liable for any such losses, damages or injuries it may be so finally decreed by this Court; and

WHEREAS, by an order entered herein October 8, 1914, this Court has directed that on the filing of a stipulation for value in the sum of $70,500, with good and sufficient surety, a monition issue 100
out of and under the seal of this Court against all persons claiming damages for any and all losses, damages or injuries occasioned by or resulting from the collision between the steamship *Pomaron* and the steamship *Alleghany* on February 2, 1912, and the subsequent sinking of said steamship *Alleghany,* citing them to appear before this Court and make due proof of their respective

101 *Monition.*

claims on or before the 18th day of January, 1915, at 10:30 o'clock in the forenoon, and appointing Alex. Gilchrist, Jr., Esq., as Commissioner, before whom proof of claims which shall be presented in pursuance of said monition shall be made subject to the right of any person to controvert; and

102 WHEREAS, on October 9, 1914, the petitioner duly filed with the Clerk of this Court a stipulation for value in the sum of $70,500 undertaking to pay said sum on the entry of the final decree rendered by this Court, or by any Appellate Court if an appeal intervene, with interest from February 4, 1912;

YOU ARE, THEREFORE, COMMANDED to cite all persons claiming damages for any loss, damage,
103 injury or destruction occasioned by said collision or by the subsequent sinking of said steamship to appear before said Court and make due proof of their respective claims, before Alex. Gilchrist, Jr., Esq., Commissioner, at his office Post Office Building, New York City, on or before the 18th day of January, 1915, at 10:30 o'clock in the forenoon, and you are also commanded to cite such claimants to appear and answer the petition herein, on or before said last named date,
104 or within such further time as said Court may grant, and to have and receive such relief as may be due.

And what you have done in the premises, do you then make return to this Court, together with this writ.

WITNESS the HON. CHARLES M. HOUGH, Judge of the District Court of the United States for the Southern District of New York, this 9th day

of October, in the year One thousand nine hundred and fourteen, and of the Independence of the United States the one hundred and thirty-ninth.

ALEX. GILCHRIST, JR.,
Clerk.

[SEAL]

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Petitioner.

[Endorsed:] — District Court of the United States, Southern District of New York—In the Matter of the Petition of Furness, Withy & Co., Ltd., for limitation of its Liability as owner of the steamship *Pomaron*—Monition — Burlingham, Montgomery & Beecher, Proctors for Petitioner, 27 William Street, Borough of Manhattan, New York City—Copy received Oct. 13, 1914, Williams & Stevenson, Proctor for Boston Ins. Co.—Harrington, Bigham & Englar, 64 Wall St., New York, Copy received Oct. 13, 1914.—A copy of the within paper has been this day received at this office, Oct. 14, 1914, H. Snowden Marshall, U. S. Attorney—Filed Oct. 9, 1915.

109 *Answer.*

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Matter

110 of

The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of its Liability as owner of the steamship "POMARON." } Answer.

The BOSTON INSURANCE COMPANY, claimant
111 herein, answering the petition of Furness, Withy & Company, Limited, alleges as follows:

FIRST: The claimant admits the allegations of the "First," "Second," "Fifth," "Sixth," and "Seventh" paragraphs of the petition.

SECOND: The claimant denies the allegations of the "Third," and "Fourth," paragaraphs of the petition, except that it admits that the collision and the loss, damage, injury and de-
112 struction resulting therefrom, were occasioned and incurred without the privity or knowledge of the petitioner.

Furthering answering the petition, the claimant alleges:

THIRD: That it heretofore filed a libel in this Court against Furness Withy & Company, Limited, the petitioner, to recover damages for

loss resulting from the collision between the said Steamship *Pomaron* and the Steamship *Alleghany* on February 2, 1912; and thereafter, on October 3, 1914, a final decree was entered in said action adjudging that the collision was due to the negligence and fault in the navigation of the said Steamship *Pomaron,* and further adjudging and decreeing that the Boston Insurance Company, the claimant herein, should recover against Furness, Withy & Company, Limited, the petititoner, the sum of $9,768.93, with interest thereon until paid.

FOURTH: That by reason of the said decree the matters set forth in the "Third" and "Fourth" paragraphs of the petition are *res adjudicata.*

WHEREFORE the claimant prays that the petition may be dismissed, except as to the claim of the petitioner for limitation of liability, with costs to the claimant.

WARD D. WILLIAMS,
Proctor for Claimant,
Boston Insurance Company,
Office and P. O. Address,
No. 27 Cedar Street,
Borough of Manhattan,
New York City.

117 *Answer.*

STATE OF NEW YORK, }
County of New York, } ss.:

WARD WILLIAMS, being duly sworn, deposes and says that he is the Vice-President of the Boston Insurance Company, the claimant herein, and that the facts as set forth in the foregoing answer are true to the best of his knowl-
118 edge, information and belief.

WARD WILLIAMS.

Sworn to before me, this 16th }
day of January, 1915. }

BALTHASAR J. CARUSO,
[SEAL] Notary Public,
Kings County.

Certificate filed in N. Y. Co.

119 [Endorsed:]—District Court of the U. S., Southern District of New York—In the Matter of the Petition of Furness, Withy & Company, Limited, for Limitation, etc., of the Steamship *Pomaron*—Answer—Ward D. Williams, Proctor for Claimant, Boston Insurance Co., 27 Cedar Street, Borough of Manhattan, City of New York—Copy received, Jan. 18, 1915, Burlingham, Montgomery & Beecher—Filed, Jan. 18,
120 1915.

Answer. 121

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The answer of the Atlantic Mutual Insurance Company to the petition of Furness, Withy & Company, Limited, owner of the Steamship *Pomaron* in a cause of limitation of liability, civil and maritime, alleges as follows: 122

First: The Atlantic Mutual Insurance Company is a corporation organized under the laws of the State of New York, and has duly filed its claim in this proceeding with the commissioner appointed by this Court.

Second: It admits the allegations contained in the first, second and third articles of the petition. 123

Third: It admits that the collision between the Steamship *Pomaron* and the Steamship *Alleghany*, mentioned and described in the petition and the loss, damage, injury and destruction resulting therefrom were occasioned and incurred without the privity or knowledge of the petitioner; and that fault on the part of those in charge of the navigation of the Steamship *Alleghany* contributed to the collision, in that they failed to 124 maintain a good lookout and in that there was no officer or any competent person in charge of her navigation for some time prior to the collision.

Except as hereinabove specifically admitted it denies the allegations of the Fourth article of the petition and alleges:

That at the time those on the *Pomaron* first sighted the *Alleghany* at about 10:35 and un-

125 *Answer.*

til after the collision occurred at about 11:24 A. M. the weather was clear and the *Alleghany* was always in view from the *Pomaron.* The *Alleghany* was steering a course of S. 2° W. magnetic. That although the vessels were on crossing courses no proper compass bearing of the *Alleghany* was at any time taken or noted by the officer in charge of the *Pomaron.* When
126 the two vessels were at least one mile apart, and from five to seven minutes before collision the *Pomaron* blew a one blast signal and ported her helm. Within one to three minutes thereafter the *Alleghany* blew a signal of two blasts, whereupon and when the two vessels were half a mile or more apart, the *Pomaron* put her helm hard a port and her engines full speed astern. The collision happened four minutes thereafter, the
127 bow of the *Pomaron* striking the starboard side of the *Alleghany* about 100 feet from the latter's stern. Shortly before the collision the *Alleghany's* helm was put hard a starboard changing her heading from three to four points before the collision occurred.

It alleges and charges that the collision was due to fault on the part of the *Pomaron,* in that (1) no proper compass bearing of the *Alleghany* was taken by those in charge of the *Pomaron* at
128 any time; (2) that having the *Alleghany* on her port bow, the *Pomaron* failed to keep her course and changed her course to port when the vessels were a mile or more apart; (3) in reversing her engines when the vessels were half a mile or more apart.

FOURTH: It admits the allegations of the Fifth article of the petition.

Answer.

FIFTH: It admits the allegations of the Sixth article of the petition, except that it denies that the value of the petitioners' interest in the *Pomaron* and her pending freight is only $70,419.14. It alleges that shortly after said collision the Hamburg American Line owner of the Steamship *Alleghany* filed its petition in this Court for a limitation of its liability for the loss, damage and injury resulting from the collision described in the petition herein; and that the petitioner Furness, Withy & Company, Limited, filed in said proceeding a claim for the sum of $16,610 for the damages sustained by the *Pomaron* in said collision; that thereafter and on or about the 29th day of September, 1913, a final decree was made by this Court in said proceeding, whereby it was ordered, adjudged and decreed that this petitioner Furness, Withy & Company, Limited, recover from the Hamburg American Line the sum of $9,122.83 on account of the petitioner's said claim. That thereafter and on or about the 29th day of September, 1913, the said Hamburg American Line paid to the petitioner the said sum of $9,122.83, and that said sum should be added to the sum of $70,419.14 which the petitioner alleges to be the value of the *Pomaron* and her pending freight.

SIXTH: It admits the allegations of the Seventh article of the petition.

SEVENTH: It admits the jurisdiction of this Court but denies the general allegation in the Ninth article of the petition that all and singular the premises of the petition are true.

Wherefore this claimant prays that the prayer of said petition that the petitioner be adjudged

not liable to any extent for any loss, damage or injury or for any claim arising out of or in consequence of said collision, be denied with costs.

KNEELAND, HARISON & HEWITT,
Proctors for Atlantic Mutual Ins. Co., Claimant.

Southern District of New York, ss.:

CORNELIUS ELDERT being duly sworn, deposes and says that he is Vice President of the claimant Atlantic Mutual Insurance Company, and that the foregoing answer is true to the best of his knowledge, information and belief.

CORNELIUS ELDERT.

Sworn to before me this 13th day of January, 1915.

WILLIAM DEVINTER,
[SEAL] Notary Public,
Kings County.
Certificate filed in New York County.
Commission expires March 30, 1916, No. 14.

[Endorsed:]—58-112—District Court of the United States for the Southern District of New York—In the Matter of the libel and petition of Furness, Withy & Company, Limited, owner of the Steamship *Pomaron* in a cause of limitation of liability—Answer of Atlantic Mutual Insurance Company—Kneeland, Harison & Hewitt, Proctors for Claimant, No. 42 Cedar Street, New York City. —To Messrs. Burlingham, Montgomery & Wheeler, 27 William St.—Copy received Burlingham, Montgomery & Beecher January 19, 1915—Filed January 18, 1915.

Answer. 137

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The answer of the Federal Insurance Company, Sea Insurance Company, Ltd., and London Assurance Corporation, Claimants, to the petition of Furness, Withy & Company, Limited, owner of the Steamship *Pomoran*, in a cause of limitation of liability, alleges as follows: 138

First: The Federal Insurance Company is a corporation organized under the laws of the State of New Jersey and the Sea Insurance Company, Ltd., and London Assurance Corporation are corporations organized under the laws of the United Kingdom of Great Britain and Ireland. These claimants have duly filed claims in this proceeding with the Commissioner appointed by this Court. 139

Second: They admit the allegations of the first, second and third articles of the petition.

Third: They admit that the collision between the Steamship *Pomaron* and the Steamship *Alleghany* alleged in the petition and the loss, damage, injury and destruction resulting therefrom were occasioned and incurred without the privity or knowledge of the petitioner, and that fault on the part of the Steamship *Alleghany* 140 contributed to said collision in that she failed to maintain a good lookout and in that no officer or competent person was in charge of her navigation for some time prior to said collision.

Except as hereinabove specifically admitted they deny the allegations of the fourth article of the petition.

Fourth: They admit the allegations of the fifth article of the petition.

141 *Answer.*

FIFTH: They admit the allegations of the sixth article of the petition except that they deny that the value of the Steamship *Pomaron* and her pending freight is only $70,419.14, and allege that shortly after the said collision between the *Pomaron* and the *Alleghany,* the Hamburg-American Line, owner of the Steamship *Alleghany,* filed in this Court a petition
142 for limitation of its liability for the loss, damage and injury resulting from said collision, that the Petitioner, Furness, Withy & Company, Limited, filed its claim in said proceeding for the sum of $16,610. the amount of the damages to the Steamship *Pomaron* by said collision; that thereafter and on or about the 29th day of September, 1913, a final decree was made by this Court in said proceeding
143 whereby it was ordered, adjudged and decreed that Furness, Withy & Company, Limited, recover of the Hamburg-American Line the sum of $9,122.83 on account of the petitioner's said claim; that thereafter and on or about the 29th day of September, 1913, the said Hamburg-American Line paid to the petitioner the said sum of $9,122.83 and that said sum should be added to the $70,419.14, which is alleged in said petition to be the value of the *Pomaron* and her pending
144 freight.

SIXTH: They admit the allegations of the Seventh article of the petition.

SEVENTH: They admit the jurisdiction of this Court but deny the general allegation in the Ninth article of the petition that all and singular the premises thereof are true.

EIGHTH: And further answering said petition these claimants allege:

Answer.

That on the 3rd day of December, 1912, they filed in this Court a joint libel against the petitioner Furness, Withy & Company, Limited, to recover damages sustained by them by reason of the collision between the Steamships *Pomaron* and *Alleghany*, alleged and described in the petition herein, and that on the 8th day of January, 1913, the petitioner appeared in said action and filed its answer to the libel of these claimants. That such proceedings were thereafter had in said action, that this Court made a final decree therein on the 13th day of June, 1913, adjudging that these claimants recover against Furness, Withy & Company, Limited, damages and interest amounting together to $23,980.99 together with $54.05 costs.

That thereafter Furness, Withy & Company, Limited, the petitioner herein, appealed from the aforesaid decree of this Court to the United States Circuit Court of Appeals for the Second Circuit, and the United States Circuit Court of Appeals having heard the said appeal, issued its Mandate bearing date the 23rd day of June, 1914, affirming the said decree of this Court entered on the 13th day of June, 1913, with interest and with costs of said appeal to the appellees, these claimants, taxed at $38.50, which Mandate was thereafter duly filed in this Court. That on the 3rd day of October, 1914, a decree was made by this Court wherein it was ordered, adjudged and decreed that the said Mandate of the United States Circuit Court of Appeals for the Second Circuit be made the judgment of this Court.

That the claim filed by these claimants in this proceeding is for the damages awarded by the said decree of this Court in the action aforesaid, with interest thereon; and that by the decrees

149 *Answer.*

aforesaid the liability of the petitioner to these claimants has become and now is *res adjudicata*.

WHEREFORE these claimants pray that the prayer of the petition herein that the petitioner be adjudged not liable to any extent for the consequence of said collision be denied with costs.

KNEELAND, HARISON & HEWITT,
150 Proctors for Claimants.

Southern District of New York, ss.:

SIDNEY CHUBB, being duly sworn, deposes and says that he is Treasurer of the Federal Insurance Company, and that the foregoing answer is true to the best of his knowledge, information and belief.

SIDNEY CHUBB.

151 Sworn to before me this 14th day of January, 1915.

LOUIS H. MAY,
[SEAL] Notary Public,
Kings County.

Certificate filed in New York County.

[Endorsed:]—58-112—District Court of the United States, for the Southern District of New York—In the Matter of the libel and
152 petition of Furness, Withy & Company, Limited, owner of the Steamship *Pomaron* in a cause of limitation of liability—Answer of Federal Insurance Company, *et al.*—Kneeland, Harison & Hewitt, Proctors for Claimant, No. 42 Cedar Street, New York City—To Messrs. Burlingham, Montgomery & Beecher, 27 William St.—Copy Received Burlingham, Montgomery & Beecher, Jan. 19, 1915—Filed Jan. 18, 1915.

Notice of Appearance. 153

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter
of
The petition of FURNESS, WITHY & COMPANY, LTD., for limitation of its liability as owner of the *S. S. Pomaron.* 154

PLEASE TAKE NOTICE that I appear for the Boston Insurance Company, claimant in the above entitled cause.

Dated, New York, January 15, 1915.

Yours, etc.,
WARD D. WILLIAMS, 155
Proctor for Claimant,
Boston Insurance Company,
Office and P. O. Address,
No. 27 Cedar Street,
Borough of Manhattan,
New York City.

To:
BURLINGHAM, MONTGOMERY & BEECHER, ESQS.,
Proctors for Petitioner.
ALEXANDER GILCHRIST, JR., ESQ., 156
Clerk.

[Endorsed:] District Court of the United States, Southern District of New York—In the Matter of the Petition of Furness, Withy & Company, Ltd., for limitation, etc., of the Steamship *Pomaron*—Original—Notice of appearance, Ward D. Williams, Proctor for Claimant, 27 Cedar Street, Borough of Manhattan, City of New York—Filed Jan. 18, 1915.

157 *Notice of Appearance.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

158 The petition of FURNESS, WITHY & COMPANY, LTD., for limitation of its liability as owner of the *S. S. Pomaron.*

PLEASE TAKE NOTICE that Harrington, Bigham & Englar appear on behalf of Antoine Joseph, one 159 of the claimants in this cause.

Dated, New York, January 18, 1915.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Antoine Joseph.

To:

MESSRS. BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Petitioner.

ALEXANDER GILCHRIST, ESQ.,
Clerk of the U. S. District Court for the
160 Southern District of New York.

[Endorsed:]—United States District Court, Southern District of New York—In the Matter of the petition of Furness, Withy & Company, Ltd., for limitation of liability as owner of the Steamship *Pomaron*—Original—Notice of appearance, Harrington, Bigham & Englar, Attorneys for Antoine Joseph, 64 Wall Street, New York City—Filed January 18, 1915.

Notice of Appearance. 161

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

The petition of FURNESS, WITHY & COMPANY, LTD., for limitation of its liability as owner of the *S. S. Pomaron.* 162

PLEASE TAKE NOTICE that Harrington, Bigham & Englar appear on behalf of Eugene J. F. Coleman, one of the claimants in this cause. 163

Dated, New York, January 18, 1915.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Eugene J. F. Coleman.

To:

MESSRS. BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Petitioner.

ALEXANDER GILCHRIST, ESQ.,
Clerk of the U. S. District Court for the Southern District of New York. 164

[Endorsed:]—United States District Court, Southern District of New York—In the Matter of the petition of Furness, Withy & Company, Ltd., for limitation of liability as owner of the Steamship *Pomaron*—Original—Notice of appearance—Harrington, Bigham & Englar, Attorneys for Eugene J. F. Coleman, 64 Wall Street, New York City—Filed January 18, 1915.

165 *Exception to Provisional Valuation.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

166 of

The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of its Liability as owner of the steamship "POMARON."

The Federal Insurance Company, Sea Insur-
167 ance Company, Limited, and London Assurance Corporation, and the Atlantic Mutual Insurance Company, Claimants herein, hereby except to the provisional valuation of the Steamship *Pomaron* and her pending freight, at $70,419.14 in the order of this court entered herein, October 8, 1914, and to the amount of the stipulation for value filed by the petitioner herein, on the ground and for the reason that the petitioner recovered and received from the Hamburg-American Line,
168 owner of the Steamship *Alleghany,* on or about the 29th day of September, 1913, the sum of $9,122.82 in part payment of the damages sustained by the said Steamship *Pomaron* by the collision alleged in the petition herein, and has failed to include said sum of $9,122.82 in the provisional valuation of the *Pomaron* and her

pending freight and in the stipulation for value filed in this proceeding.

Dated, January 18th, 1915.

KNEELAND, HARISON & HEWITT,
Proctors for Federal Ins.
Co. *et al.*, Claimants.

To:

MESSRS. BURLINGHAM, MONTGOMERY & BEECHER, 170
Proctors for Petitioner,
ALEXANDER GILCHRIST, JR., ESQ.,
Clerk.

[Endorsed:] — 58-112 — United States District Court, Southern District of New York—In the Matter of the Petition of Furness, Withy & Company, Limited, for limitation of its liability as owner of the Steamship *Pomaron*—Exception to Provisional Valuation 171 —Kneeland, Harison & Hewitt, Proctors for Federal Ins. Co., *et al.*, Claimants, 43 Cedar Street, New York City, N. Y.—To Messrs. Burlingham, Montgomery & Beecher, 27 William St.—Copy received, Burlingham, Montgomery & Beecher, Jan. 19, 1915. —Filed January 18, 1915.

172

173 *Exception to Provisional Valuation.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

174

The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of its Liability as owner of the steamship "POMARON."

The Yang-tsze Insurance Association, Limited, U. S. Lloyds, Indemnity Mutual Marine Insurance Company, Limited, Nord-Deutsche Insur-
175 ance Company, Union Insurance Society of Canton, Limited, Commercial Union Assurance Company, Limited, the Corporation of Lloyds and the Aetna Insurance Company, claimants herein, except to the provisional valuation of the steamship *Pomaron* and her pending freight at $70,-419.14 in the order of this court entered herein on October 8, 1914, and to the amount of the stipulation for value filed by the petitioner herein.

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CONVERS & KIRLIN,
Proctors for Claimants, Yang-tsze Ins. Assoc. Ltd., U. S. Lloyds, Indemnity Mut. Mar. Ins. Co. Ltd., Nord-Deutsche Ins. Co., Union Ins. Soc. of Canton, Ltd., Commercial Union Assur. Co., Ltd., the Corporation of Lloyds and Aetna Ins. Co.

Exception to Provisional Valuation. 177

To:

ALEXANDER GILCHRIST, JR., ESQ.,
Clerk.

BURLINGHAM, MONTGOMERY & BEECHER, ESQS.,
Proctors for Petitioner.

[Endorsed:]—United States District Court, Southern District of New York—In the Matter of the Petition of Furness, Withy & Co. Ltd., for Limitation of its Liability, as Owner of the Steamship *Pomaron*.—Exceptions.—Convers & Kirlin, Proctors for Claimants, 27 William Street, New York, N. Y.—Filed January ~~18~~ 26, 1915. 178

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180

181 *Notice of Appearance.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

182 of

The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of Liability as owner of the steamship "POMARON."

PLEASE TAKE NOTICE that Nord-Deutsche Insur-
183 ance Company, Union Insurance Society of Canton, Limited, Commercial Union Assurance Company, Limited, the Corporation of Lloyds and the Aetna Insurance Company appear herein as claimants-respondents and that we appear as their proctors and demand that all papers be served on us at our office, Number 27 William Street, Borough of Manhattan, City of New York, N. Y.

Dated, New York, January 16, 1915.

184

CONVERS & KIRLIN,
Proctors for Claimants-Respondents,
27 William Street,
Borough of Manhattan,
City of New York, N. Y.

Notice of Appearance. 185

To:

ALEXANDER GILCHRIIST, JR., ESQ.,
Clerk.

BURLINGHAM, MONTGOMERY & BEECHER, ESQRS.,
Proctors for Libelant,
27 William Street
Borough of Manhattan,
City of New York, N. Y.

186 [Endorsed:]—United States District Court, Southern District of New York—In the Matter of the Petition of Furness, Withy & Company, Ltd., for limitation of liability, as owner of the Steamship *Pomaron*—Notice of appearance—Convers & Kirlin, Proctors for Claimants-Respondents, 27 William Street, New York, N. Y.—Filed January 18, 1915—Copy received, Burlingham, Montgomery & Beecher, January 18, 1915. 187

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

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In the Matter

of

The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of Liability as owner of the steamship "POMARON."

PLEASE TAKE NOTICE that Yang-Tsze Insurance Association, Limited, U. S. Lloyds and the Indemnity Mutual Marine ~~Insurance~~ Assurance Company,

189 *Notice of Appearance.*

Limited, appear herein as claimants-respondents and that we appear as their proctors and demand that all papers be served on us at our office, Number 27 William Street, Borough of Manhattan, City of New York, N. Y.

Dated, New York, January 16, 1915.

CONVERS & KIRLIN,
190 Proctors for Claimants-Respondents,
27 William Street,
Borough of Manhattan,
City of New York, N. Y.

To:

ALEXANDER GILCHRIST, JR., ESQ.,
Clerk.

BURLINGHAM, MONTGOMERY & BEECHER, ESQRS.,
Proctors for Libelant,
191 27 William Street,
Borough of Manhattan,
City of New York, N. Y.

[Endorsed:]—United States District Court, Southern District of New York—In the Matter of the Petition of Furness, Withy & Company, Ltd., for limitation of liability, as owner of the Steamship *Pomaron*—Notice of appearance—Convers & Kirlin, Proctors for
192 Claimants-Respondents, 27 William Street, New York, N. Y.—Filed January 18, 1915—Copy received, Burlingham, Montgomery & Beecher, January 18, 1915.

Affidavit of Publication. 193

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

In the Matter
of
The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of Liability as owners of the steamship "POMARON." 194

STATE OF NEW YORK,
City and County of New York, } ss.:

Jno. J. Kelley, being duly sworn, says he is advertising clerk of the Evening Mail, a daily newspaper published in the City and County of New York, and that the notice, of which the annexed is a printed copy, has been regularly published in the said Evening Mail fourteen times successively, commencing on the 13th day of October, 1914, and the rate charged and paid for the publication of such notice in the annexed bill is not in excess of the commercial rate to private individuals. 195

JNO. J. KELLEY. 196

Sworn to before me, this 29th day of October, 1914.

H. MODERY, Notary Public

Kings County Certificate filed in N. Y. Co.,
Kings County No. 89,
Kings Register's No. 6084,
New York County No. 97,
New York Register's No. 6212
Commission expires March 30, 1916.

(Seal)

197 *Affidavit of Publication.*

United States of America, Southern District of New York, Citation:

Whereas a petition was filed in the District Court of the United States, for the Southern District of New York, on the 5th day of October, 1914, by Furness, Withy & Company, Ltd., praying for the limitation of its liability as owners
198 of the Steamship *Pomaron,* concerning the loss, damage, injury, and destruction occasioned by the collision between the Steamship *Pomaron* and the Steamship *Alleghany,* for the reasons mentioned by said petition:

And, whereas, on October 9, 1914, the petitioner filed with the Clerk of this Court a stipulation for the valuation in the sum of $70,500, being the appraised value of said Steamsh[ip] *Pomaron,* undertaking to pay the said sum of [$70,500] upon
199 the final decree rendered by th[is Court] or by any Appellate Court if an [appeal be] taken, with interest, from the 4th [day of] February, 1912:

Now, therefore, pursuant to the monition issued out of said Court, to me directed and delivered, I do hereby cite all persons claiming damages, for any and all losses, damages or injuries, caused by or resulting from the collision between the Steamship *Pomaron,* and the Steam-
200 ship Alleghany on February 2, 1912, and the subsequent sinking of said Steamship *Alleghany* to appear and make due proof of their respective claims before Alexander Gilchrist, Jr., Esq., United States Commissioner, at his office, Post Office Building, New York City on or before January 18, 1915 at 10:30 o'clock in the forenoon of that day, and also to appear before said Court at the Court Rooms in the Woolworth

In Feb. 2, 1912 and the subsequent sinking of the Steamship Alleghany

Building, New York on the 18th day of January, 1915 at 10:30 o'clock in the forenoon of that day and answer the petition herein; otherwise they will be defaulted and barred from participation in said stipulation.

Dated, New York, October 9, 1914.

WILLIAM HENKEL,
U. S. Marshall for the Southern District of New York.
BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Petitioner.

MONITION.

THE PRESIDENT OF THE UNITED STATES OF AMERICA:

To the Marshal of the United States for the Southern District of New York, GREETING:

WHEREAS, a petition was filed in the District Court of the United States for the Southern District of New York on the 5th day of October, 1914, by Furness, Withy & Company, Limited, praying for a limitation of its liability as owner of the steamship *Pomaron*, concerning the loss, damage, injury and destruction occasioned by or resulting from the collision between the steamship *Pomaron* and the steamship *Alleghany* on February 2, 1912, and the subsequent sinking of said steamship *Alleghany*, for the reasons mentioned in said petition, and praying that a monition issue out of said Court citing all persons claiming damages for any and all losses, dam-

205 ages or injuries to appear before said Court and make due proof of their respective claims, and answer the allegations of said petition, and that if it shall appear that the petitioner is not liable for any such losses, damages or injuries it may be so finally decreed by this Court; and

206 WHEREAS, by an order entered herein October 8, 1914, this Court has directed that on the filing of a stipulation for value in the sum of $70,500, with good and sufficient surety, a monition issue out of and under the seal of this Court against all persons claiming damages for any and all losses, damages or injuries occasioned by or resulting from the collision between the steamship *Pomaron* and the steamship *Alleghany* on February 2, 1912, and the subsequent sinking of
207 said steamship *Alleghany*, citing them to appear before this Court and make due proof of their respective claims on or before the 18th day of January, 1915, at 10:30 o'clock in the forenoon, and appointing Alex. Gilchrist, Jr, Esq., as Commissioner, before whom proof of claims which shall be presented in pursuance of said monition shall be made subject to the right of any person to controvert; and

208 WHEREAS, on October 9, 1914, the petitioner duly filed with the Clerk of this Court a stipulation for value in the sum of $70,500, undertaking to pay said sum on the entry of the final decree rendered by this Court, or by any Appellate Court if an appeal intervene, with interest from February 4, 1912;

YOU ARE, THEREFORE, COMMANDED to cite all persons claiming damages for any loss, damage, in-

jury or destruction occasioned by said collision or by the subsequent sinking of said steamship to appear before said Court and make due proof of their respective claims, before Alex. Gilchrist, Jr., Esq., Commissioner, at his office Post Office Building, New York City, on or before the 18th day of January, 1915, at 10:30 o'clock in the forenoon, and you are also commanded to cite such claimants to appear and answer the petition 210 herein, on or before said last named date, or within such further time as said Court may grant, and to have and receive such relief as may be due.

And what you have done in the premises, do you then make return to this Court, together with this writ.

WITNESS the HON. CHARLES M. HOUGH, Judge of the District Court of the United States for the 211 Southern District of New York, this 9th day of October, in the year One thousand nine hundred and fourteen, and of the Independence of the United States the one hundred and thirty-ninth.

ALEX. GILCHRIST, JR.,
[SEAL] Clerk.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Petitioner.

[Endorsed:] — District Court of the United 212 States, Southern District of New York—In the Matter of the Petition of Furness, Withy & Company, Limited, for Limitation of its Liability as Owner of the steamship *Pomaron*—Monition—Burlingham, Montgomery & Beecher, Proctors for Petitioner, 27 William Street, Borough of Manhattan, New York City—Filed Jan. 18, 1914.

213 *Return of Monition.*

I do hereby certify that in obedience to the within Monition I have cited all persons claiming damages for any loss, damage, injury or destruction occasioned by said collision or by the subsequent sinking of said St. Ship, to be and appear before this court on the 18th day of January, 1915, at 10:30 A. M., as herein required by publication of Notice in the Evening
214 Mail, a newspaper published in the City of New York by the Evening Mail Co. as required by the within Monition and annexed order, and as appears by proof of publication hereto annexed.

Dated, New York, January 18, 1915. Wm Heuvel

~~N. V. Neuber,~~
U. S. Marshal,
S. D., N. Y.

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Order on Default. 217

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Court Rooms, Borough of Manhattan, City of New York, on the 18th day of January, 1915.

Present—Hon. Augustus N. Hand, 218
Judge.

In the Matter
of
The Petition of Furness, Withy & Company, Limited, for Limitation of Liability as owner of the steamship "Pomaron." 219

A libel and petition having been filed in this Court on the 5th day of October, 1914, by Furness, Withy & Company, Limited, owner of the steamship *Pomaron,* and an order having been thereupon duly entered herein on the 8th day of October, 1914, directing that a monition issue out of this Court against all persons claiming damages for any and all losses, damage or injuries occasioned by, or resulting from, the collision between the steamship *Pomaron* and steamship *Alleghany* on February 2d, 1912, and the subsequent sinking of the steamship *Alleghany* and damage to the steamship *Pomaron,* citing all such persons to appear before this Court and make due proof of their respective claims on or before the 18th day of January, 1915, at 10:30 o'clock in the forenoon, and further ordering that Alex. Gilchrist, Jr., Esq., be appointed Commissioner to take proof of claims presented pur- 220

suant to said monition, and a monition having been duly issued on the 9th day of October, 1914, in pursuance of said order for monition, and said monition having been duly returned by the Marshal of the United States for the Southern District of New York, with proof of citation of all parties interested, and Alex. Gilchrist, Jr., Esq., having duly made his report to this Court on January 18th, 1915, showing all claims presented in pursuance of said monition on or before January 18th, 1915, the return day of said monition, now on motion of Burlingham, Montgomery & Beecher, proctors for petitioner, Furness, Withy & Company, Limited, it is

ORDERED, ADJUDGED AND DECREED that the default of all persons who shall not have appeared or presented claims on or before this day, January 18th, 1915, be and the same hereby is directed to be entered.

AND IT IS FURTHER ORDERED that the time of petitioner or any claimant filing a claim to except to or file objections to any claim shall be extended to and include ten days after entry of interlocutory decree.

AND IT IS FURTHER ORDERED that the time of all claimants to answer the petition herein shall extend to and include the 1st day of February, 1915.

AUGUSTUS N. HAND,
D. J.

A. G. Jr.

[Endorsed:] — District Court of the United States, Southern District of New York—In the Matter of the Petition of Furness, Withy & Company, Limited, for Limitation of Liability, as owner of the steamship *Pomaron*—Order on Default of Return of Monition—Burlingham, Montgomery & Beecher, Proctors for Petitioner, 27 William Street, Borough of Manhattan, New York City—Received Convers & Kirlin, January 25, 1915.

Commissioner's Report. 225

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

The Libel and Petition of FURNESS, WITHY & COMPANY, LTD., as owners of the steamship "POMARON" for Limitation of Liability. 226

To the United States District Court for the Southern District of New York:

I, Alex. Gilchrist, Jr., the Commissioner named in the order of this court made and entered in this proceeding on the 8th day of ~~November~~ October, 1914, before whom the claims of all persons for any loss, damage or injury, occasioned by or resulting from the collision set forth in the libel and petition herein, were required to be presented, on or before the 18th day of January, 1915, do respectfully report that the following claims have been presented to me: 227 228

The Norddeutsche Ins. Co., Union Ins. Co., of Canton, Ltd., the Corporation of Lloyds and Aetna Ins. Co., amount of judgment recovered in the U. S. District Court, S. D. of New York, on June 12, 1913, $14,252.02

229 *Commissioner's Report.*

M. H. Silvera, judgment, October 2, 1914, 2,135.59
Laura Moore, judgment, June 13, 1913, 11,977.41
Walter Oloffson, *et al.*, judgment, October 3, 1914, 2,039.97
Eugene J. F. Coleman, judgment, June 13, 1913, 5,706.27
230 Eugene J. F. Coleman, judgment, October 6, 1914, 35.00
O. G. Orr, judgment, June 13, 1913, 28,250.85
F. W. Van Praag, judgment, June 13, 1913, 1,115.57
M. K. Weidensaul, judgment, June 13, 1913, 1,118,27
L. Bertschman, judgment, June 13, 1913, 30,815.22
231 Hazan & Co., judgment, October 3, 1914, 1,247.35
Yang Tsze Ins. Ass. Ltd., *et al.*, judgment, June 12, 1913, 19,737.59
and
October 2, 1914, 74.91
Boston Ins. Co., judgment, October 3, 1914, 9,768.93
Federal Ins. Co. *et al.*, judgment, June 13, 1913, 24,035.04
232 and
October 3, 1914, 38.50
U. S. of America, judgment, June 13, 1913, 5,470.00
G. Kattan, for damages for loss of cargo, 161.37
J. L. de Picciotto, for damages for loss of cargo, 1,145.30

A. Joseph, for damages for loss of cargo, 1,126.33

H. C. Bock, for damages for loss of cargo, 1,125.03

W. D. Despard, for damages for loss of cargo, 14,831.24

Robert Dutton & Co., for damages for loss of cargo, 1,658.72

234

Atlantic Mutual Ins. Co., for damages for loss of cargo, 16,745.00

M. Dahens, for damages for loss of cargo, 522.~~00~~ 74

H. Borday, for damages for loss of cargo, 198.69

A. Gagny, for damages for loss of cargo, 266.94

That the said claims are hereto annexed and made a part of this report. 235

That no other claims have been presented to me; all of which is respectfully submitted.

New York, January 18, 1915.

ALEXANDER GILCHRIST, Jr.,
Commissioner.

236

237 *Claim.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of 238 The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of Liability as owner of the steamship "POMARON."	Claim of Nord Deutsche Insurance Company, *et al.*

Now comes Nord-Deutsche Insurance Company, Union Insurance Society of Canton, Lim-
239 ited, Commercial Union Assurance Company, Limited, the Corporation of Lloyds and the Aetna Insurance Company and present their claims against Furness, Withy & Company, Limited, as follows:

FIRST: At all the times hereinafter mentioned the libelant, Nord-Deutsche Insurance Company was and it still is a corporation organized and existing under the laws of the German Empire,
240 and is engaged in the business of marine insurance, with an office for the transaction of business at No. 3 So. William Street, in the Borough of Manhattan, City of New York.

SECOND: At all the times hereinafter mentioned, the libelant, Union Insurance Society of Canton, Limited, was and it still is a corporation duly organized and existing under the laws of the Colony of Hong Kong, and is engaged in the business of marine insurance, with an office for

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the transaction of business at No. 3 So. William Street, in the Borough of Manhattan, City of New York.

THIRD: At all the times hereinafter mentioned, the libelant, Commercial Union Assurance Company, Limited, was and it still is a corporation, duly organized and existing under the laws of the United Kingdom of Great Britain and Ireland, and is engaged in the business of marine insurance, with an office for the transaction of business at No. 51 Wall Street, Borough of Manhattan, City of New York.

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FOURTH: At all the times hereinafter mentioned, The Corporation of Lloyds was and it still is a corporation duly organized and existing under the laws of the United Kingdom of Great Britain and Ireland, and is engaged in the business of marine insurance, with an office for the transaction of business at No. 66 Beaver Street, in the Borough of Manhattan, City of New York.

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FIFTH: At all the times hereinafter mentioned, the libelant, Aetna Insurance Company, was and it still is a corporation duly organized and existing under the laws of the State of Connecticut, and is engaged in the business of marine insurance, with an office for the transaction of business at No. 63 Beaver Street, Borough of Manhattan, City of New York.

244

SIXTH: On or about the 2nd day of July, 1912, the Nord-Deutsche Insurance Company, the Union Insurance Society of Canton, Limited, The Commercial Union Assurance Company, Limited,

245 *Claim.*

the Corporation of Lloyds and the Aetna Insurance Company filed a joint libel against Furness, Withy & Company, Limited, as owner of the Steamship *Pomaron,* in which libel the said several claimants sought to recover certain amounts paid by them to the owners of certain shipments of goods on board the *Alleghany,* which were insured with the several claimants
246 under marine policies against marine perils during the voyage of the *Alleghany* on which she was sunk by collision with the *Pomaron,* owing to the joint fault of the said vessels. The said libel came on to be heard in due course on the pleadings and proofs adduced by the respective parties, together with certain other libels filed by and in behalf of other insurers of goods on board the *Alleghany* and in behalf of the owners
247 of goods thereon. The court held that the *Pomaron* was partly to blame for the collision and ordered a decree in favor of the several libelants against Furness, Withy & Company, Limited, for the losses suffered by them by reason of said collision. The damages of these claimants were agreed on by and with the proctors for Furness, Withy & Company, Limited, and the other parties in interest, as follows:

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Nord-Deutsche Insurance Company, Limited,	$2,304.16
Union Insurance Society of Canton, Limited,	315.74
Commercial Union Assurance Company, Limited	217.64
Corporation of Lloyds	1,331.73
Aetna Insurance Company,	8,979.21
	$13,148.48

249

It was agreed that the said amounts should bear interest from February 2, 1912, and on June 12, 1913, a final decree and judgment was made accordingly, and thereafter entered in the United States District Court, for the Southern District of New York, against Furness, Withy & Company, Limited, wherein and whereby it was provided that the claimants, Nord-Deutsche Insurance Company, Limited, Union Insurance Society of Canton Limited, Commercial Union Assurance Company Limited, the Corporation of Lloyds and Aetna Insurance Company should recover of Furness, Withy & Company, Limited, the sum of $13,148.48, with interest thereon from February 2, 1912, in the sum of $1,051.88, together with $51.70 costs, amounting in all to $14,252.02, with interest thereon until paid.

250

251

SEVENTH: Thereafter, Furness, Withy & Company, Limited, appealed from the said judgment and decree of the United States District Court for the Southern District of New York to the Circuit Court of Appeals for the Second Circuit. Thereafter said appeal duly came on to be heard and the said Court of Appeals rendered an opinion whereby it affirmed the judgment of the District Court, and on or about the 23rd day of June, 1914, the Circuit Court of Appeals entered its decree whereby it was ordered adjudged and decreed that the decree of the District Court be affirmed with interest and costs. Thereafter the mandate of the Circuit Court of Appeals to the District Court was duly filed in and made the judgment of the said District Court, and on October 2, 1914, a decree and judgment on mandate was entered in the United States District Court for the Southern District of New York.

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253 *Claim.*

EIGHTH: Furness, Withy & Company, Limited, against whom said decrees were entered, and who is the petitioner herein, has not satisfied or paid these decrees in whole or in part, and the decrees aforesaid still remain wholly unsatisfied and unpaid, and under them the total sums therein provided to be paid to these claimants by Fur-
254 ness, Withy & Company, Limited, still remain due and owing to these claimants.

NINTH: The collision for losses due to which these claimants recovered the decree and judgment aforesaid is the collision in respect of which Furness, Withy & Company, Limited, now seeks to limit its liability by the petition in which this claim is filed, and by reason of the said decrees the matters alleged in the petition are *res ad-*
255 *judicata* as between these claimants and Furness, Withy & Company, Limited.

TENTH: By reason of the premises there is now due and owing to these claimants under the said decrees the sum of $14,252.02, with interest from June 12, 1913, until paid.

ELEVENTH: All and singular the premises are true and within the Admiralty and Maritime jur-
256 isdiction of the United States and of this Honorable Court.

WHEREFORE, the said claimants pray that they be allowed by this Honorable Court to make due proof of their claims, amounting to the said sum of $14,252.02, with interest from June 12, 1913, and costs, and that it be ordered, adjudged and decreed:

Claim.

1. That the full amount of the decrees aforesaid with interest as prayed be allowed to these claimants against Furness, Withy & Company, Limited, the petitioner herein.

2. That in the event of its being held that the petitioner is entitled to limit its liability to the value of the Steamship *Pomaron* and her pending freight that these claimants and other judgment creditors, and all parties participating in the decrees aforesaid recover such amounts as may be ratably due to each of them out of the fund in court as the result of these proceedings.

3. That all parties holding decrees or judgments against Furness, Withy & Company, Limited, in respect of the collision set forth in the petition be preferred in any distribution of the said fund which may be made over all parties not having such decrees or judgments.

4. That the court grant to these claimants their costs of these proceedings, and such other or further relief as may be just in the premises.

CONVERS & KIRLIN,
Proctors for Claimants.

SOUTHERN DISTRICT OF NEW YORK, } ss.:
County of New York, }

CHARLES F. WREAKS being duly sworn, says:

That he is a Director of the corporation of Wilcox, Peck & Hughes, and that the said corporation is the agent in New York of the libelants, Union Insurance Society of Canton, Limited; that the foregoing claim is true of his own knowl-

edge, except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

The sources of his information and the grounds of his belief as to the matters not within his own knowledge are reports and communications received from the claimants.

The reason that this verification is not made by the claimants is that they are foreign corporations, and the reason that it is not made by any officer of the said corporation is that none of them is at present within the United States.

CHARLES F. WREAKS.

Sworn to before me this 15th day of January, 1915.

L. DEGROVE POTTER,
[SEAL] Notary Public,
Westchester County.

Certificate filed in New York County No. 60.

Claim. 265

DISTRICT COURT OF THE UNITED STATES.

FOR THE SOUTHERN DISTRICT OF NEW YORK

In the Matter
of
The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of its Liability as owner of the steamship "POMARON." } Claim. 266

M. H. Silvera makes claim against the above named Furness, Withy & Company, Limited, petitioner, as owner of the steamship *Pomaron,* as follows: 267

At the time of the collision in the petition herein referred to between the steamships *Pomaron* and *Alleghany* a portion of the cargo in board said steamship *Alleghany* was owned by the present claimant. Thereafter a libel was filed in this court by the present claimant against Furness, Withy & Company, Limited, as owner of the steamship *Pomaron,* and such proceedings were thereupon and thereafter had in said suit that at a Stated Term of the District Court of the United States for the Southern District of New York held on the 2nd day of October, 1914, a final decree on mandate was made in said suit wherein and whereby it was ordered, adjudged and decreed that the libelant, M. H. Silvera, should recover of the respondent, Furness, Withy & 268

269 *Claim.*

Company, Limited, the sum of $1,975.18 with interest thereon from February 2, 1912, in the sum of $158.01, together with $2.40 costs as taxed, amounting in all to the sum of $2,135.59 with interest thereon until paid. This claimant begs to refer to said final decree dated October 2, 1914, and filed in the office of the Clerk of said District Court on October 3, 1914, with the same
270 force and effect as if a certified copy of said decree were annexed to this claim.

Wherefore claimant presents this his claim in this proceeding for the aggregate amount of Two thousand one hundred and thirty-five and 59/100 dollars ($2,135.59) with interest from the 2nd day of October, 1914.

Of said amount the sum of Two and 40/100 dollars ($2.40) with interest from October 2,
271 1914, is, as claimant is informed and believes, payable in full, being costs accrued prior to the institution of the limitation proceeding herein.

Dated, New York, November 17, 1914.

BARRY, WAINWRIGHT, THACHER & SYMMERS,
Proctors for M. H. Silvera.

To:

ALEXANDER GILCHRIST, ESQ.,
272 Commissioner.

To:

MESSRS. BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Furness, Withy & Co., Ltd.,
Petitioner.

Claim. 273

CITY, COUNTY AND STATE OF NEW YORK, } ss:
Southern District of New York, }

JAMES K. SYMMERS, being duly sworn, says that he is a member of the firm of Barry, Wainwright, Thacher & Symmers, proctors for claimant M. H. Silvera above named, and that the foregoing claim is true and correct to the best of his knowledge, information and belief. That the 274
sources of his information and the grounds of his belief a[illegible]rticipation in the suit of M. H. Silvera against [illegible]urness, Withy & Company, Limited, mentioned in said claim, as one of the proctors for such libelant, and inspection of the final decree on mandate entered in said suit. That the reason this verification is not made by said M. H. Silvera is that claimant is not now within one hundred miles of New York City, to the knowledge of deponent. 275

JAMES K. SYMMERS.

Sworn to before me, this 17th }
day of November, 1914. }

D. H. MCALPIN PYLE,
[NOTARIAL SEAL] Notary Public,
New York County No. 3012.
New York Register No. 6020.

276

277 *Claim.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter 278 of The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of Liability as owner of the steamship "POMARON."	Claim of Laura Moore.

Now appears LAURA MOORE, a resident of the City of New York, and makes claim against the
279 steamship *Pomaron* as follows:

THE NATURE OF THE CLAIMANT'S CLAIM:

Claimant has recovered a judgment against Furness, Withy & Company, Limited, owner of the steamship *Pomaron*, for the sum of $11,040.84, with interest thereon from February 2nd, 1912, in the sum of $883.27, together with $53.30 costs, amounting in all to the sum of $11,977.41, with interest from the 13th day of June, 1913, until
280 paid, in the United States District Court for the Southern District of New York, for damages sustained by the said claimant as a result of loss of goods and merchandise which were on board the steamship *Allegheny* when she was sunk as a result of a collision with the steamship *Pomaron* at a point off the coast of Virginia on February 2nd, 1912, while the said steamship *Allegheny* was proceeding towards ports in the West Indies on a voyage from New York.

Claim.

THE GROUNDS OF THE CLAIMANT'S CLAIM:

The grounds of the claimant's claim are that she has recovered a judgment against the owner of the steamship *Pomaron* in the sum of $11,977.41, with interest from the 13th of June, 1913, until paid, in the United States District Court for the Southern District of New York, and that the said judgment remains unpaid. That the said judgment was recovered for damages sustained by the claimant for loss of goods which were on board the steamship *Allegheny* when she was sunk on February 2nd, 1912, as a result of a collision with the steamship *Pomaron*, as aforesaid.

THE ITEMS OF YOUR CLAIMANT'S CLAIM ARE AS FOLLOWS:

Judgment obtained in the United States District Court for the Southern District of New York for $11,977.41.

Your claimant's claim accrued on the 13th day of June, 1913. No credits are due on the said claim, nor have any payments been made on account thereof.

The said collision was caused and contributed to by the fault and negligence of the steamship *Pomaron* and the steamship *Allegheny*, by reason of which your claimant has sustained damage amounting to the sum of $11,977.41, for which she now makes claim against the steamship *Pomaron*.

Dated, New York, December, 19, 1914.

LAURA MOORE.
Claimant.
HARRINGTON, BINGHAM & ENGLAR,
Proctors for Claimant.

285 *Claim.*

STATE OF NEW YORK,
County of New York, } ss.:

LAURA MOORE, being duly sworn, deposes and says, that she is the claimant herein; that she has read the foregoing claim and knows the contents thereof, and that the same is true to the best of her knowledge, information and belief.

286

LAURA MOORE.

Sworn to before me this 19th
day of December, 1914.

RUSSELL H. PORTER,
[N. S.] Notary Public,
New York County.

287

288

Claim. 289

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Matter of The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of its Liability as owner of the steamship "POMARON."	Claim.

290

Walter Oloffson, Robert Luacas and C. Lyon Paul, doing business as Oloffson, Luacas & Company, make claim against the above named Furness, Withy & Company, Limited, petitioner, as owner of the steamship *Pomaron,* as follows: 291

At the time of the collision in the petition herein referred to between the steamships *Pomaron* and *Allegheny* a portion of the cargo on board said steamship *Allegheny* was owned by the present claimants. Thereafter a libel was filed in this court by the present claimants against Furness, Withy & Company, Limited, as owner 292 of the steamship *Pomaron,* and such proceedings were thereupon and thereafter had in said suit that at a Stated Term of the District Court of the United States for the Southern District of New York held on the 2nd day of October, 1914, a final decree on mandate was made in said suit wherein and whereby it was ordered, adjudged and decreed that the libelants, Walter Oloffson,

293 *Claim.*

Robert Luacas and C. Lyon Paul, doing business as Oloffson, Luacas & Company, should recover of the respondent, Furness, Withy & Company, Limited, the sum of $1,886.64 with interest thereon from February 2, 1912, in the sum of $150.93, together with $2.40 costs as taxed, amounting in all to the sum of $2,039.97, with interest thereon until paid. These claimants beg to refer to said
294 final decree dated October 2, 1914, and filed in the office of the Clerk of said District Court on October 3, 1914, with the same force and effect as if a certified copy of said decree were annexed to this claim.

WHEREFORE claimants present this their claim in this proceeding for the aggregate amount of Two thousand and thirty-nine and 97/100 dollars ($2,039.97) with interest from the 2nd day of
295 October, 1914.

Of said amount the sum of Two and 40/100 dollars ($2.40) with interest from October 2, 1914, is, as claimants are informed and believe, payable in full, being costs accrued prior to the institution of the limitation proceeding herein.

Dated, New York, November 17, 1914.

BARRY, WAINWRIGHT, THATCHER & SYMMERS,
Proctors for Oloffson, Luacas & Co.

296 To:

ALEXANDER GILCHRIST, Esq.,
Commissioner.

Messrs. BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Furness, Withy & Co., Ltd.,
Petitioner.

Claim. 297

CITY, COUNTY AND STATE OF NEW YORK, } ss.:
Southern District of New York, }

JAMES K. SYMMERS, being duly sworn, says that he is a member of the firm of Barry, Wainwright, Thatcher & Symmers, proctors for claimants Oloffson, Luacas & Company above named, and that the foregoing claim is true and correct to the best of his knowledge, information and belief. 298 That the sources of his information and the grounds of his belief are participation in the suit of Walter Oloffson, *et al.*, against Furness, Withy & Company, Limited, mentioned in said claim, as one of the proctors for such libelants, and inspection of the final decree on mandate entered in said suit. That the reason this verification is not made by one of the said firm of Oloffson, Luacas & Company is that no member of that firm is now within one hundred miles of New York City, to 299 the knowledge of deponent.

JAMES K. SYMMERS.

Sworn to before me this 17th }
day of November, 1914. }

D. H. MCALPIN PYLE,
[NOTARIAL SEAL] Notary Public.
New York County No. 3012.
New York Register No. 6020.

300

75

301 *Claim.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of 302 The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of its Liability as owner of the steamship "POMARON."	Claim of Eugene J. F. Coleman.

Now appears EUGENE J. F. COLEMAN, a resident of the City of New York, and makes claim
303 against the steamship *Pomaron*, as follows:

THE NATURE OF THE CLAIMANT'S CLAIM:

Claimant has recovered a judgment against Furness, Withy & Company, Limited, owner of the steamship *Pomaron*, for the sum of $5,234.23, with interest thereon from February 2nd, 1912, in the sum of $418.74, together with $53.30 costs, amounting in all to the sum of $5,706.27, with interest from the 13th day of June, 1913, until paid,
304 in the United States District Court for the Southern District of New York ,for damages sustained by the said claimant as a result of loss of goods and merchandise which were on board the steamship *Allegheny* when she was sunk as a result of a collision with the steamship *Pomaron* at a point off the cost of Virginia on February 2nd, 1912, while the said steamship *Allegheny* was proceeding towards ports in the West Indies on a voyage from New York.

Your claimant recovered a further judgment in the said court for the sum of $35.00, costs in the Circuit Court of Appeals, with interest thereon from October 6th, 1914, until paid. 305

THE GROUNDS OF THE CLAIMANT'S CLAIM:

The grounds of the claimant's claim are that he has recovered a judgment against the owner of the steamship *Pomaron* in the sum of $5,706.27, with interest thereon from the 13th day of June, 1913, until paid, in the United States District Court for the Southern District of New York, and that the said judgment remains unpaid; and a further judgment in said court for the sum of $35.00, with interest thereon from October 6th, 1914, until paid. That the said judgments were reocvered for damages sustained by the claimant for loss of goods which were on board the steamship *Alleghey* when she was sunk on February 2nd, 1912, as a result of a collision with the steamship *Pomaron,* as aforesaid. 306 307

THE ITEMS OF YOUR CLAIMANT'S CLAIM ARE AS FOLLOWS:

Judgment obtained in the United States District Court for the Southern District of New York on June 13th, 1913, for the sum of $5,706.27, and a further judgment obtained in the United States District Court for the Southern District of New York for the sum of $35.00, with interest from October 6th, 1914. 308

Your claimant's claim accrued as to the first item on the 13th day of June, 1913, and as to the second item on the 6th day of October, 1914. No credits are due on the said claim, nor have any payments been made on account thereof.

309 *Claim.*

The said collision was caused and contributed to by the fault and negligence of the steamship *Pomaron* and the steamship *Allegheny*, by reason of which your claimant has sustained damage amounting to the sum of $5,741.27, for which he now makes claim against the steamship *Pomaron*.

Dated, New York, December 21st, 1914.

310 EUGENE J. F. COLEMAN.
Claimant.

STATE OF NEW YORK, }
County of New York, } ss.:

EUGENE J. F. COLEMAN, being duly sworn, deposes and says, that he is the claimant herein; that he has read the foregoing claim and knows the contents thereof, and that the same is true to
311 the best of his knowledge, information and belief.

EUGENE J. F. COLEMAN.

Sworn to before me this 21st }
day of December, 1914. }

[N. S.] WILLIAM H. HARTZEL, JR.,
Notary Public,
New York County.

312

Claim. 313

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of Liability as owner of the steamship "POMARON."	Claim of Orton G. Orr. 314

NOW APPEARS Orton G. Orr, a resident of the City of New York, and makes claim against the steamship *Pomaron*, as follows: 315

THE NATURE OF THE CLAIMANT'S CLAIM:

Claimant has recovered a judgment against Furness, Withy & Company, Limited, owner of the steamship *Pomaron*, for the sum of $26,080.65, with interest thereon from February 2nd, 1912, in the sum of $2,086.45, together with $83.75 costs, amounting in all to the sum of $28,250.85, with interest from the 13th day of June, 1913, until paid, in the United States District Court 316 for the Southern District of New York, for damages sustained by the said claimant as a result of loss of goods and merchandise which were on board the steamship *Allegheny* when she was sunk as a result of a collision with the steamship *Pomaron* at a point off the coast of Virginia on February 2nd, 1912, while the said steamship *Allegheny* was proceeding towards ports in the West Indies on a voyage from New York.

317 *Claim.*

THE GROUNDS OF THE CLAIMANT'S CLAIM:

The grounds of the claimant's claim are that he has recovered a judgment against the owner of the steamship *Pomaron* in the sum of $28,-250.85, with interest from the 13th of June, 1913, until paid, in the United States District Court for the Southern District of New York, and that
318 the said judgment remains unpaid. That the said judgment was recovered for damages sustained by the claimant for loss of goods which were on board the steamship *Allegheny* when she was sunk on February 2nd, 1912, as a result of a collision with the steamship *Pomaron*, as aforesaid.

THE ITEMS OF YOUR CLAIMANT'S CLAIM ARE AS FOLLOWS:

319 Judgment obtained in the United States District Court for the Southern District of New York for $28,250.85.

Your claimant's claim accrued on the 13th day of June, 1913. No credits are due on the said claim, nor have any payments been made on account thereof.

The said collision was caused and contributed to by the fault and negligence of the steamship
320 *Pomaron* and the steamship *Alleghany*, by reason of which your claimant has sustained damage amounting to the sum of $28,250.85, for which he now makes claim against the steamship *Pomaron*.

Dated, New York, December 19th, 1914.

ORTON G. ORR,
Claimant.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Claimant.

Claim. 321

STATE OF NEW YORK,
County of New York, } ss.:

ORTON G. ORR, being duly sworn, deposes and says, that he is the claimant herein; that he has read the foregoing claim and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

ORTON G. ORR. 322

Sworn to before me this 19th day of December, 1914.

RUSSELL H. PORTER,
[NOTARIAL SEAL] Notary Public,
New York County.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK. 323

In the Matter of The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of Liability as owner of the steamship "POMARON."	Claim of Francis W. Van Praag.

324

Now appears Francis W. Van Praag, a resident of the City of New York and makes claim against the steamship *Pomaron,* as follows:

THE NATURE OF THE CLAIMANT'S CLAIM:

Claimant has recovered a judgment against Furness, Withy & Company, Limited, owner of

325 *Claim.*

the steamship *Pomaron,* for the sum of $983.58, with interest thereon from February 2nd, 1912, in the sum of $78.69, together with $53.30 costs, amounting in all to the sum of $1,115.57, with interest from the 13th day of June, 1913, until paid, in the United States District Court for the Southern District of New York, for dam-
326 ages sustained by the said claimant as a result of loss of goods and merchandise which were on board the steamship *Allegheny* when she was sunk as a result of a collision with the steamship *Pomaron* at a point off the coast of Virginia on February 2nd, 1912, while the said steamship *Allegheny* was proceeding towards ports in the West Indies on a voyage from New York.

327 THE GROUNDS OF THE CLAIMANT'S CLAIM:

The grounds of the claimant's claim are that he has recovered a judgment against the owner of the steamship *Pomaron* in the sum of $1,115.57, with interest from the 13th day of June, 1913, until paid, in the United States District Court for the Southern District of New York, and that the said judgment remains unpaid. That the said judgment was recovered for
328 damages sustained by the claimant for loss of goods which were on board the steamship *Allegheny* when she was sunk on February 2nd, 1912, as a result of a collision with the steamship *Pomaron,* as aforesaid.

THE ITEMS OF YOUR CLAIMANT'S CLAIM ARE AS FOLLOWS:

Judgment obtained in the United States District Court for the Southern District of New York for $1,115.57.

Claim.

Your claimant's claim accrued on the 13th day of June, 1913. No credits are due on the said claim, nor have any payments been made on account thereof.

The said collision was caused and contributed to by the fault and negligence of the steamship *Pomaron* and the steamship *Allegheny*, by reason of which your claimant has sustained damage amounting to the sum of $1,115.57, for which he now makes claim against the steamship *Pomaron*.

Dated, New York, December , 1914.

FRANCIS W. VAN PRAAG.
Claimant.

STATE OF NEW YORK,
County of New York, } ss.:

FRANCIS W. VAN PRAAG, being duly sworn, deposes and says, that he is the claimant herein; that he has read the foregoing claim and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

FRANCIS W. VAN PRAAG.

Sworn to before me this 19th day of December, 1914.

RUSSELL H. PORTER,
Notary Public,
New York County.

[NOTARIAL SEAL]

333 *Claim.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of 334 The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of Liability as owner of the steamship "POMARON."	Claim of Marshall K. Weidensaul.

Now appears MARSHALL K. WEIDENSAUL, a resident of the City of New York, and makes claim
335 against the steamship *Pomaron,* as follows:

THE NATUE OF THE CLAIMANT'S CLAIM:

Claimant has recovered a judgment against Furness, Withy & Company, Limited, owner of the steamship *Pomaron,* for the sum of $986.08, with interest thereon from February 2nd, 1912, in the sum of $78.89, together with $53.30 costs, amounting in all to the sum of $1,118.27, with interest from the 13th day of June, 1913, until paid,
336 in the United States District Court for the Southern District of New York, for damages sustained by the said claimant as a result of loss of goods and merchandise which were on board the steamship *Allegheny* when she was sunk as a result of a collision with the steamship *Pomaron* at a point off the cost of Virginia on February 2nd, 1912, while the said steamship *Allegheny* was proceeding towards ports in the West Indies on a voyage from New York.

Claim. 337

THE GROUNDS OF THE CLAIMANT'S CLAIM:

The grounds of the claimant's claim are that he has recovered a judgment against the owner of the steamship *Pomaron* in the sum of $1,118.27, with interest from the 13th of June, 1913, until paid, in the United States District Court for the Southern District of New York, and that the said judgment remains unpaid. That 338 the said judgment was recovered for damages sustained by the claimant for loss of goods which were on board the steamship *Allegheny* when she was sunk on February 2nd, 1912, as a result of a collision with the steamship *Pomaron*, as aforesaid.

THE ITEMS OF YOUR CLAIMANT'S CLAIM ARE AS FOLLOWS:

Judgment obtained in the United States Dis- 339 trict Court for the Southern District of New York for $1,118.27.

Your claimant's claim accrued on the 13th day of June, 1913. No credits are due on the said claim, nor have any payments been made on account thereof.

The said collision was caused and contributed to by the fault and negligence of the steamship *Pomaron* and the steamship *Allegheny*, by reason 340 of which your claimant has sustained damage amounting to the sum of $1,118.27, for which he now makes claim against the steamship *Pomaron*.

Dated, New York, December 21st, 1914.

MARSHALL K. WEIDENSAUL,
Claimant.

341 *Claim.*

STATE OF NEW YORK,
County of New York, } ss.:

MARSHALL K. WEIDENSAUL, being duly sworn, deposes and says, that he is the claimant herein; that he has read the foregoing claim and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

342 MARSHALL K. WEIDENSAUL.

Sworn to before me this 21st day of December, 1914.

RUSSELL H. PORTER,
[N. S.] Notary Public,
New York County.

UNITED STATES DISTRICT COURT,

343 SOUTHERN DISTRICT OF NEW YORK.

In the Matter of The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of Liability as owner 344 of the steamship "POMARON."	Claim of Louis Bertschmann.

Now Appears Louis Bertschmann, a resident of the City of New York, and makes claim against the steamship *Pomaron,* as follows:

THE NATURE OF THE CLAIMANT'S CLAIM:

Claimant has recovered a judgment against Furness, Withy & Company, Limited, owner of

the Steamship *Pomaron,* for the sum of $28,-483.26, with interest thereon from February 2nd, 1912, in the sum of $2,278.66, together with $53.30 costs, amounting in all to the sum of $30,815.22, with interest from the 13th day of June, 1913, until paid, in the United States District Court for the Southern District of New York, for damages sustained by the said claimant as a result of loss of goods and merchandise which were on board the steamship *Allegheny* when she was sunk as a result of a collision with the steamship *Pomaron* at a point off the coast of Virginia on February 2nd, 1912, while the said steamship *Allegheny* was proceeding towards ports in the West Indies on a voyage from New York.

THE GROUNDS OF THE CLAIMANT'S CLAIM:

The grounds of the claimant's claim are that he has recovered a judgment against the owner of the steamship *Pomaron* in the sum of $30,-815.22, with interest from the 13th day of June, 1913, until paid, in the United States District Court for the Southern District of New York, and that the said judgment remains unpaid. That the said judgment was recovered for damages sustained by the claimant for loss of goods which were on board the steamship *Allegheny* when she was sunk on February 2nd, 1912, as a result of a collision with the steamship *Pomaron,* as aforesaid.

THE ITEMS OF YOUR CLAIMANT'S CLAIM ARE AS FOLLOWS:

Judgment obtained in the United States District Court for the Southern District of New York for $30,815.22.

349 *Claim.*

Your claimant's claim accrued on the 13th day of June, 1913. No credits are due on the said claim, nor have any payments been made on account thereof.

The said collision was caused and contributed to by the fault and negligence of the steamship *Pomaron* and the steamship *Allegheny*, by reason of which your claimant has sustained damage
350 amounting to the sum of $30,815.22, for which he now makes claim against the steamship *Pomaron*.

Dated, New York, December —, 1914.

LOUIS BERTSCHMANN,
Claimant.

STATE OF NEW YORK,
County of New York, } ss.:

351 LOUIS BERTSCHMANN, being duly sworn, deposes and says, that he is the claimant herein; that he has read the foregoing claim and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

LOUIS BERTSCHMANN.

Sworn to before me this 22nd day of December, 1914.

352 REINHOLD BUGE, JR.,
[NOTARIAL SEAL] Notary Public,
New York County.

Notary Public, Bronx County.
Certificate No. 118 filed in New York County.
New York Register No. 6236.

Claim. 353

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Matter of The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of its Liability as owner of the steamship "POMARON."	354 Claim.

Hazan & Company makes claim against the above named Furness, Withy & Company, Limited, petitioner, as owner of the steamship *Pomaron*, as follows: 355

At the time of the collision in the petition herein referred to between the steamships *Pomaron* and *Allegheny* a portion of the cargo in board said steamship *Allegheny* was owned by the present claimant. Thereafter a libel was filed in this court by the present claimant against Furness, Withy & Company, Limited, as owner of the steamship *Pomaron*, and such proceedings were thereupon and thereafter had in said suit that at a Stated Term of the District Court of the United States for the Southern District of New York held on the 2nd day of October, 1914, a final decree on mandate was made in said suit wherein and whereby it was ordered, adjudged and decreed that the libelant, Hazen & Company, should recover of the respondent, Furness, Withy & 356

357 *Claim.*

Company, Limited, the sum of $1,152.73, with interest thereon from February 2, 1912, in the sum of $92.22, together with $2.40 costs as taxed, amounting in all to the sum of $1,247.35, with interest thereon until paid. This claimant begs to refer to said final decree dated October 2, 1914, and filed in the office of the Clerk of the District
358 Court on October 3, 1914, with the same force and effect as if a certified copy of said decree were annexed to this claim.

WHEREFORE claimant presents this its claim in this proceeding for the aggregate amount of One thousand two hundred and forty-seven and 35/100 dollars ($1,247.35) with interest from the 2nd day of October, 1914.

Of said amount the sum of Two and 40/100 dollars ($2.40) with interest from October 2, 1914,
359 is, as claimant is informed and believes, payable in full, being costs accrued prior to the institution of the limitation proceeding herein.

Dated, New York, November 17, 1914.

BARRY, WAINWRIGHT, THACHER & SYMMERS,
Proctors for Hazan & Co.

To:

ALEXANDER GILCHRIST, Esq.,
360 Commissioner.

To:

Messrs. BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Furness, Withy & Co.,, Ltd.,
Petitioner.

Claim. 361

CITY, COUNTY AND STATE OF NEW YORK, } ss.:
Southern District of New York, }

JAMES K. SYMMERS, being duly sworn, says that he is a member of the firm of Barry, Wainwright, Thacher & Symmers, proctors for claimant, Hazan & Company, above named, and that the foregoing claim is true and correct to the best of his knowledge, information and belief. That the 362
sources of his information and the grounds of his belief are participation in the suit of Hazan & Company against Furness, Withy & Company, Limited, mentioned in said claim, as one of the proctors for such libelant, and inspection of the final decree on mandate entered in said suit. That the reason this verification is not made by one of the said firm of Hazan & Company is that no member of that firm is now within one hundred miles of New York City, to the knowledge of de- 363
ponent.

JAMES K. SYMMERS.

Sworn to before me, this 17th }
day of November, 1914. }

D. H. MCALPIN PYLE,
[NOTARIAL SEAL] Notary Public.
New York County No. 3012.
New York Register No. 6020.

364

365 *Claim.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of 366 The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of Liability as owner of the steamship "POMARON."	Claim of Yang-tsze Insurance Association, Ltd., *et al.*

Now comes the Yang-tsze Insurance Association, limited, and Herbert Appleton and Douglas
367 F. Cox, attorneys in fact for the subscribers of the U. S. Lloyds and the Indemnity Mutual Marine Insurance Company, Limited, and present their claims against Furness, Withy & Company, Limited, as follows:

FIRST: The claimant Yang-tsze Insurance Association, Limited, was and it is a corporation organized under the laws of the Colony of Hong Kong and is engaged in the business of marine
368 insurance, with an office for the transaction of business at No. 3 South William Street, in the Borough of Manhattan, City of New York.

SECOND: At all the times hereinafter mentioned, Herbert Appleton and Douglas F. Cox, were and they are attorneys in fact for one hundred individual marine underwriters as subscribers of U. S. Lloyds and were authorized in their behalf to prosecute this suit. U. S. Lloyds

has an office for the transaction of business at No. 3 South William Street, in the Borough of Manhattan, City of New York. 369

THIRD: At the times hereinafter mentioned, the Indemnity Mutual Marine Assurance Company, Limited, was and it is a corporation organized under the laws of the Kingdom of Great Britain and Ireland, and is engaged in the business of marine insurance with an office in New York. 370

FOURTH: On or about the 27th day of February, 1912, the claimants herein named filed a joint libel against Furness, Withy & Company, Ltd., as owner of the Steamship *Pomaron,* in which libel the said several claimants sought to recover certain amounts paid by them to the owners of certain shipments of goods on board the *Alleghany,* which were insured with the several claimants under marine policies against marine perils during the voyage of the *Alleghany* on which she was sunk by collision with the *Pomaron,* owing to the joint fault of the said vessels. The said libel came on to be heard in due course on the pleadings and proofs adduced by the respective parties, together with certain other libels filed by and in behalf of other insurers of goods on board the *Alleghany,* and in behalf of the owners of goods thereon, the court held that the *Pomaron* was partly to blame for the collision and ordered a decree in favor of the several libelants against Furness, Withy & Company, Ltd., for the losses suffered by said libelants by reason of said collision. The damages of these claimants were agreed on by and with the proctors for Furness, Withy & Com- 371 372

pany, Ltd., and the other parties in interest, as follows:

The Yang-tsze Insurance Association, Ltd.,	$9,149.71
United States Lloyds,	7,273.07
Indemnity Mutual Marine Assurance Company, Ltd.,	1,802.21
374	$18,224.99

It was agreed that the said amounts should bear interest from February 2, 1912, and on June 12, 1913, a final decree and judgment was made accordingly, and on June 13, 1913, was entered in the United States District Court, for the Southern District of New York against Furness, Withy & Company, Ltd., wherein and whereby
375 it was provided that the claimants, the Yang-tsze Insurance Association, Ltd., Herbert Appleton and Douglas F. Cox, as attorneys in fact for U. S. Lloyds and the Indemnity Mutual Marine Assurance Company, Ltd., should recover of Furness, Withy & Company, Ltd., the sum of $18,224.99, with interest thereon from February 2, 1912, in the sum of $1,458, together with $54.60 costs as taxed, amounting in all to the sum of $19,737.59, with interest thereon until paid.

376

FIFTH: Thereafter, Furness, Withy & Company, Ltd., appealed from the said judgment and decree of the United States District Court for the Southern District of New York to the Circuit Court of Appeals for the Second Circuit. Thereafter said appeal duly came on to be heard and the said Circuit Court of Appeals rendered an opinion whereby it affirmed the judgment of the

District Court, and on or about the 23rd day of June, 1914, the Circuit Court of Appeals entered its decree whereby it was ordered, adjudged and decreed that the decree of the said District Court be affirmed with interest and costs. Thereafter the mandate of the Circuit Court of Appeals to the said District Court was duly filed in and made a judgment of the said District Court, and on October 2, 1914, a decree and judgment on mandate was entered in the United States District Court for the Southern District of New York, which provided that the Yang-tsze Insurance Association, Limited, *et al.*, recover of Furness, Withy & Company, Ltd., the further sum of $70.91 costs in the Circuit Court of Appeals, and $4 disbursements, with interest thereon until paid.

SIXTH: Furness, Withy & Company, Ltd., against whom said decrees were entered, and who are the petitioners herein, have not satisfied or paid these decrees in whole or in part, and the decrees aforesaid still remain wholly unsatisfied and unpaid, and under them the total sums therein provided to be paid to these claimants by Furness, Withy & Company, Ltd., still remain due and owing to these claimants.

SEVENTH: The collision for losses due to which these claimants recovered the decree and judgment aforesaid is the collision in respect of which Furness, Withy & Company, Ltd., now seeks to limit its liability by the petition in which this claim is filed, and by reason of the said decrees the matters alleged in the petition are *res adjudicata* as between these claimants and Furness, Withy & Company, Ltd.

381 *Claim.*

EIGHTH: By reason of the premises there is now due and owing to these claimants under the said decrees the sum of $19,737.59, with interest from June 12, 1913, until paid, and the sum of $74.91, with interest from October 2, 1914, until paid.

NINTH: All and singular the premises are true
382 and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, the said claimants pray that they be allowed by this Honorable Court to make due proof of their claims, amounting to the said sum of $19,737.59, with interest from June 12, 1913, and the said sum of $74.91, with interest from October 2, 1914, and costs, and that it be
383 ordered, adjudged and decreed:

1. That the full amount of the decrees aforesaid with interest as prayed be allowed to these claimants against Furness, Withy & Company, Ltd., the petitioner herein.

2. That in the event of its being held that the petitioner is entitled to limit its liability to the value of the Steamship *Pomaron* and her pending
384 freight that these claimants and other judgment creditors, and all parties participating in the decrees aforesaid recover such amounts as may be ratably due to each of them out of the fund in court as the result of these proceedings.

3. That all parties holding decrees or judgments against Furness, Withy & Company, Ltd., in respect of the collision set forth in the petition be preferred in any distribution of the said

fund which may be made over all parties not having such decrees or judgments.

4. That the court grant to these claimants their costs of these proceedings, and such other or further relief as may be just in the premises.

CONVERS & KIRLIN,
Proctors for Claimants.

SOUTHERN DISTRICT OF NEW YORK, }
County of New York, } ss.:

CHARLES F. WREAKS being duly sworn, says:

That he is a Director of the corporation of Willcox, Peck & Hughes, and that the said corporation is the agent in New York of the libelants, Yang-tsze Insurance Association, Ltd.; that the foregoing claim is true of his own knowledge, except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

The sources of his information and the grounds of his belief as to the matters not within his own knowledge are reports and communications received from the claimants.

The reason that this verification is not made by the claimants is that they are foreign corporations, and the reason that it is not made by any officer of the said corporation is that none is at present within the United States.

CHARLES F. WREAKS.

Sworn to before me this 15th }
day of January, 1915. }

L. DEGROVE POTTER,
[SEAL] Notary Public,
Westchester County.

Certificate filed in New York County No. 60.

389 *Claim.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter
of
390 The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of its Liability as owner of the steamship "POMARON."

The Boston Insurance Company, claimant, presenting its claim against the petitioner above named, alleges as follows:

FIRST: That heretofore it filed a libel in this
391 Court against Furness, Withy & Company, Limited, the petitioner herein, as owner of the steamship *Pomaron,* to recover damages for loss resulting from the collision between the said steamship *Pomaron* and the steamship *Allegheny,* on February 2, 1912; and thereafter, on October 3, 1914, a final decree was entered in said action in favor of the Boston Insurance Company, the claimant herein, as libelant, and against the said Furness, Withy & Company, Limited, the peti-
392 tioner herein, for the sum of $9,768.93, with interest thereon until paid.

SECOND: That the said Boston Insurance Company, claimant, hereby makes and files its claim against the said petitioner for the amount of said decree; namely, the sum of Nine thousand seven hundred sixty-eight and 93/100 Dollars ($9,768.-93), with interest thereon until paid.

Claim.

393

WHEREFORE, The Boston Insurance Company, claimant, prays that the Commissioner appointed to receive claims herein will report that the said sum is due to this claimant and should be allowed to it out of the proceeds of the bond given for the appraised value of the said steamship *Pomaron* herein.

Dated, New York, January 7, 1915.

394

WILLIAMS & STEVENSON,
Proctors for Claimant,
Boston Insurance Company,
Office & P. O. Address,
#27 Cedar Street,
Borough of Manhattan,
New York City.

SOUTHERN DISTRICT OF NEW YORK, ss.:

395

WARD WILLIAMS, being duly sworn, deposes and says, that he is the Vice-President of the Boston Insurance Company, the claimant herein, and the facts set forth in the foregoing claim are true to the best of his knowledge, information and belief.

WARD WILLIAMS.

Sworn to before me, this 12th day of January, 1915.

396

BALTHASAR J. CARUSO,
[SEAL] Notary Public,
Kings Co.

Certificate filed in New York Co.

397 *Claim.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

398 of

The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of its Liability as owner of the steamship "POMARON."

The Federal Insurance Company, Sea Insurance Company, Ltd., and London Assurance Cor-
399 poration, make claim against the petitioner Furness, Withy & Company, as follows:

On the 3rd day of December, 1912, these claimants filed in this court a joint libel against the petitioner Furness, Withy & Company, Limited, owner of the Steamship *Pomaron* for the recovery of damages sustained by them by reason of the collision between the Steamship *Pomaron* and the Steamship *Alleghany* alleged and described
400 in the petition in this proceeding and for which damages, and other damages, the petitioner herein prays for a limitation of its liability; and on the 8th day of February, 1913, the petitioner Furness, Withy & Company, Limited, appeared in said action and filed its answer to the said libel of these claimants.

Such proceedings were thereafter had in said action that this court on the 13th day of June,

401

1913, made a final decree in said action, adjudging that these claimants, the Federal Insurance Company, Sea Insurance Company, Ltd., and London Assurance Corporation recover of the respondent therein, the petitioner Furness, Withy & Company, Ltd., damages and interest amounting together to $23,980.99 together with $54.05 costs.

402

Thereafter Furness, Withy & Company, Limited, the petitioner herein, appealed from the aforesaid decree to the United States Circuit Court of Appeals for the Second Circuit, and the said United States Circuit Court of Appeals having heard said appeal, issued its mandate bearing date the 23rd day of June, 1914, affirming the said decree of this court entered on the 13th day of June, 1913, with interests and with costs of said appeal to the appellees these 403
claimants, taxed at $38.50, which mandate was thereafter duly filed in this court.

On the 3rd day of October, 1914, a decree was made by this court, wherein it was ordered, adjudged and decreed that the said mandate of the United States Circuit Court of Appeals for the Second Circuit, be made the judgment of this court, and that these respondents recover against Furness, Withy & Company, Limited, the petitioner herein, the further sum of $38.50 404
costs.

No part of the said decree in favor of these claimants has been paid.

WHEREFORE the Federal Insurance Company, Sea Insurance Company, Ltd., and London Assurance Corporation make claim against the

405 *Claim.*

petitioner herein for the sum of $23,980.99 with interest thereon from June 13, 1913,

KNEELAND, HARISON & HEWITT,
Proctors for Federal Ins. Co.,
Sea Ins. Co., Ltd., and
London Assurance Corporation,
Claimants.

406 Southern District of New York, ss.:

HENDON CHUBB being duly sworn, deposes and says that he is Vice-president of the Federal Insurance Company, and that he is a member of the firm of Chubb & Son, which firm are the agents in the City of New York of the Sea Insurance Company, Ltd., and of the London Assurance Corporation, and that the foregoing claim is in all respects true.

407 HENDON CHUBB.

Sworn to before me this 9th day of January, 1915.

LOUIS H. MAY,
(SEAL) Notary Public,
Kings County.

Certificate filed in New York County.

408

Claim. 409

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of its Liability as owner of the steamship "POMARON." } 58/112. 410

SIRS:

YOU WILL PLEASE TAKE NOTICE, that the within is a copy of a claim filed in the above proceeding on the part of the United States, with Alexander Gilchrist, Jr., Esquire, heretofore appointed Commissioner herein, by order dated the 8th day of October, 1914, in his office in the United States Court and Post Office Building in the City of New York on the 8th day of January, 1915. 411

Dated, New York, January 8th, 1915.

Respectfully,

H. SNOWDEN MARSHALL, 412
United States Attorney,
Proctor for the United States,
Office and Post Office Address,
Room 254 Post Office Building,
Borough of Manhattan,
City of New York.

413 *Claim.*

To:

ALEXANDER GILCHRIST, JR., ESQUIRE,
Commissioner.

Messrs. CONVERS & KIRLIN,
Proctors for Yang-tsze
Insurance Company, Ltd., *et al.*

Messrs. KNEELAND, HARRISON & HEWITT,
414 Proctors for Federal Insurance Company,
et al.

Messrs. BARRY, WAINWRIGHT, THATCHER
and SYMMERS,
Proctors for Walter Oloffson, *et al.*

Messrs. WILLIAMS and STEVENSON,
Proctors for Boston Insurance Co.

Messrs. HARRINGTON, BIGHAM and ENGLAR,
Proctors for Walter D. Despard, *et al.*

415

Messrs. BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Petitioner.
27 William Street.

416

Claim. 417

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

418

The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of its Liability as owner of the steamship "POMARON."

AND now comes the United States of America by its Proctor, H. Snowden Marshall, United States Attorney for the Southern District of New 419
York, and upon information and belief makes claim against the above-named Furness, Withy & Company, Ltd., and the said Steamship *Pomaren* as follows:

THAT heretofore, to wit, on the 13th day of June, 1913, the United States of America recovered a judgment in the sum of four thousand nine hundred and ninety-eight dollars and forty-nine cents ($4,998.49) against the above-named Furness, 420
Withy & Company, Ltd., for damages for loss of mails arising from a collision between the said Steamship *Pomaron* and the Steamship *Allegheny,* as will more fully and at large appear, reference being thereunto had by the records of the Clerk of the District Court of the United States for the Southern District of New York;

THAT no part of the aforesaid judgment has been paid and the full amount thereof is due, to-

gether with interest from the 13th day of June, 1913, to the date of the filing of this claim, amounting to the further sum of four hundred and seventy-one dollars and fifty-one cents ($471.51), making in the aggregate the sum of five thousand four hundred and seventy dollars ($5,470). Wherefore the said United States of America, by its Proctor aforesaid, now presents its claim in the aggregate amount of five thousand four hundred and seventy dollars ($5,470), with lawful interest thereon.

H. SNOWDEN MARSHALL,
United States Attorney,
Proctor for the United States,
Office and Post Office Address,
Room 254 Post Office Building,
Borough of Manhattan,
City of New York.

SOUTHERN DISTRICT OF NEW YORK, }
County of New York, } ss.:

H. SNOWDEN MARSHALL, being duly sworn, deposes and says, that he is the United States Attorney for the Southern District of New York, and Proctor herein for the United States of America; that the foregoing claim is true of his knowledge except as to the matters therein stated to be upon information and belief, and as to those matters he believes it to be true; that the reason why this verification is not made by the claimant is, because it is a Corporation Sovereign, and the sources of deponent's information and belief are the records of his office and statements made to

him by the Assistant United States Attorney in charge of this proceeding.

H. SNOWDEN MARSHALL.

Sworn to before me this day of January, 1915.

FREDERICK L. CAMPBELL,
[SEAL] Notary Public,
Kings County, No. 187.

Certificate filed in New York County.
No. 61, New York County.
Register's No. 5164, New York County.
Register's No. 6178, Kings County.
My commission expires March 30, 1915.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of Liability as owner of the steamship "POMARON."	Claim of G. Kattan.

Now appears G. Kattan, a resident of the Town of Miragoave, Haiti, and makes claim against the steamship *Pomaron,* as follows:

THE NATURE OF THE CLAIMANT'S CLAIM:

The claimant was the owner of certain goods, consisting of 20 sacks of flour, 1 case of drugs and 1 case care of the Captain of the steamship *Allegheny* which were on board the steamship *Allegheny* when she was sunk as a result of a

collision with the steamship *Pomaron* at a point off the coast of Virginia on February 2nd, 1912, while the said steamship *Allegheny* was proceeding towards ports in the West Indies on a voyage from New York.

THE GROUNDS OF THE CLAIMANT'S CLAIM:

E. Hermann Vivie shipped from New York the merchandise above mentioned, in good order and condition, on board the steamship *Allegheny,* consigned to the claimant at Miragoave, Haiti; all of the said goods being delivered to the steamship *Allegheny* at New York in good order and condition and laden thereon for carriage to the West Indies.

While the said shipment was on board the steamship *Allegheny,* the said steamship *Allegheny,* with the said cargo on board, was sunk on February 2nd, 1912, as a result of a collision with the steamship *Pomaron,* as aforesaid, and with all of her cargo, including that hereinbefore specified, belonging to your claimant, became a total loss.

THE ITEMS OF YOUR CLAIMANT'S CLAIM ARE AS FOLLOWS:

Consignee: G. Kattan, Miragoave, Haiti.

Shipment:

20 sacks of flour		$107.00	
Consul fee		1.00	
Freight, commissions, etc.		24.26	
		$132.26	
1 case care of Captain	$ 6.00		
1 case care of Captain, drugs	23.11	29.11	$161.37

Claim.

Your claimant's claim accrued on February 2nd, 1912. No credits are due on the said claim, nor have any payments been made on account thereof.

The said collision was caused and contributed to by the fault and negligence of the steamship *Pomaron* and the steamship *Allegheny*, by reason of which your claimant, as owner of the cargo aforesaid, has sustained damage amounting to the sum of One hundred and sixty-one and 37/100 ($161.37) Dollars, for which he now makes claim against the steamship *Pomaron*.

Dated, New York, January 14th, 1915.

G. KATTAN,
Claimant.
By Harrington, Bigham & Englar.

STATE OF NEW YORK, }
County of New York, } ss.:

T. CATESBY JONES being duly sworn, deposes and says that he is a member of the firm of Harrington, Bigham & Englar, proctors for the claimant herein; that he has read the foregoing claim and knows the contents thereof and that the same is true to the best of his knowledge, information and belief; that the sources of deponent's information are original documents now in his possession; that the reason this verification is not made by the claimant is that the claimant is not a resident of the United States.

T. CATESBY JONES.

Sworn to before me this 14th day of January, 1915.

WM. H. HARTZELL, JR.,
[NOTARIAL SEAL] Notary Public,
New York County No. 1539.
New York Register No. 6103.

437 *Claim.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter 438 of The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of Liability as owner of the steamship "POMARON."	Claim of J. L. de Picciotto, Trading as J. L. de Picciotto & Co.

Now appears J. L. de Picciotto, a resident of the Town of Miragoave, Haiti, and makes claim
439 against the steamship *Pomaron*, as follows:

THE NATURE OF THE CLAIMANT'S CLAIM:

The claimant was the owner of certain goods, consisting of 30 barrels of herrings, 50 packages containing bloaters, 4 full drums codfish, 6 half drums codfish, 4 quarter drums codfish, 4 barrels of mackerel, 20 half barrels of sugar and 20 half cases of soap, which were on the steamship *Allegheny* when she was sunk as a result of a collision
440 with the steamship *Pomaron* at a point off the coast of Virginia on February 2nd, 1912, while the said steamship *Allegheny* was proceeding towards ports in the West Indies on a voyage from New York.

THE GROUNDS OF THE CLAIMANT'S CLAIM:

E. Hermann Vivie shipped from New York the merchandise above mentioned, in good order

and condition, on board the steamship *Allegheny*, consigned to your claimant, at Miragoave, Haiti; all of the said goods being delivered to the steamship *Allegheny* at New York in good order and condition and laden thereon for carriage to the West Indies.

While the said shipment was on board the steamship *Allegheny* the said steamship *Allegheny*, with the said cargo on board, was sunk 442 on February 2nd, 1912, as a result of a collision with the steamship *Pomaron*, as aforesaid, and with all her cargo, including that hereinbefore specified, belonging to your claimant, became a total loss.

THE ITEMS OF YOUR CLAIMANT'S CLAIM ARE AS FOLLOW:

Consignee: J. L. de Picciotto, Miragoave, Haiti. 443
Shipment:

30 bbls. herrings	$240.00	
50 packages bloaters	122.00	
4 drums codfish	132.50	
6/2 drums codfish	100.50	
4/4 drums codfish	34.00	
4 bbls. mackerel	48.00	
20/2 bbls. sugar	122.16	
20/2 cases soap	183.75	444
	982.61	
Consul fee	1.00	
Freight, etc.	133.75	
Commission	27.94	
		$1145.30

Your claimant's claim accrued on February 2nd, 1912. No credits are due on the said claim,

445 *Claim.*

nor have any payments been made on account thereof.

The said collision was caused and contributed to by the fault and negligence of the steamship *Pomaron* and the steamship *Allegheny*, by reason of which your claimant, as owner of the cargo aforesaid, has sustained damage amounting to
446 the sum of Eleven hundred and forty-five and 30/100 ($1145.30) Dollars, for which he now makes claim against the steamship *Pomaron*.

Dated, New York, January 14th, 1915.

J. L. DE PICCIOTTO,
Claimant,
by HARRINGTON, BIGHAM & ENGLAR.

STATE OF NEW YORK, }
447 County of New York, } ss.:

T. CATESBY JONES, being duly sworn, deposes and says that he is a member of the firm of Harrington, Bigham & Englar, proctors for the claimant herein; that he has read the foregoing claim and knows the contents thereof and that the same is true to the best of his knowledge, information and belief; that the sources of deponent's information are original documents now in his possession; that the reason this verification is not
448 made by the claimant is that the claimant is not a resident of the United States.

T. CATESBY JONES.

Sworn to before me this 14th }
day of January, 1915. }

WILLIAM H. HARTZELL, JR.,
[N. S.] Notary Public.
New York County No. 1539.
New York Register No. 6103.

Claim. 449

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of Liability as owner of the steamship "POMARON."	Claim of Antoine Joseph. 450

NOW APPEARS Antoine Joseph, a resident of the Town of Aux Cayes, Haiti, and makes claim against the steamship *Pomaron,* as follows: 451

THE NATURE OF THE CLAIMANT'S CLAIM:

The claimant was the owner of certain goods, consisting of 1 case of stationery, 3 crates of furniture, 1 safe and 579 bundles of lumber, which were on board the steamship *Allegheny* when she was sunk as a result of a collision with the steamship *Pomaron* at a point off the coast of Virginia on February 2nd, 1912, while the said steamship *Allegheny* was proceeding toward ports in the 452 West Indies on a voyage from New York.

THE GROUNDS OF THE CLAIMANT'S CLAIM:

E. Hermann Vivie shipped from New York the goods merchandise above mentioned in good order and condition, on board the steamship *Allegheny,* consigned to your claimant at Aux Cayes, Haiti; all of the said goods being delivered to the said

453 steamship *Allegheny* at New York in good order and condition and laden thereon for carriage to the West Indies.

While the said shipment was on board the steamship *Allegheny*, the said steamship *Allegheny*, with the said cargo on board, was sunk on February 2nd, 1912, as a result of a collision with the steamship *Pomaron*, as aforesaid, and with 454 all of her cargo, including that hereinbefore specified, belonging to your claimant, became a total loss.

THE ITEMS OF YOUR CLAIMANT'S CLAIM ARE AS FOLLOWS:

Consignee: Antoine Joseph, Aux Cayes, Haiti.

Shipment:

455

1 case stationery	$	23.75
3 crates furniture		79.30
1 safe		75.00
327 bundles p. p. boards		335.17
252 bundles p. p. boards		356.99
		870.21
Freight, commissions, etc.		256.12
		$1,126.33

456

Your claimant's claim accrued on February 2nd, 1912. No credits are due on the said claim, nor have any payments been made on account thereof.

The said collision was caused and contributed to by the fault and negligence of the steamship *Pomaron* and the steamship *Allegheny*, by reason of which your claimant, as owner of the cargo aforesaid, has sustained damage amounting to the

sum of Eleven hundred and twenty-six and 33/100 ($1,126.33) Dollars, for which he now makes claim against the steamship *Pomaron*.

Dated, New York, January 14th, 1915.

ANTOINE JOSEPH,
Claimant,
by
HARRINGTON, BIGHAM & ENGLAR.

STATE OF NEW YORK,
County of New York, } ss.:

T. CATESBY JONES, being duly sworn, deposes and says that he is a member of the firm of Harrington, Bigham and Englar, proctors for the claimant herein; that he has read the foregoing claim and knows the contents thereof and that the same is true to the best of his knowledge, information and belief; that the sources of deponent's information are original documents now in his possession; that the reason this verification is not made by the claimant is that the claimant is not a resident of the United States.

T. CATESBY JONES.

Sworn to before me this 14th day of January, 1915.

WILLIAM H. HARTZELL, JR.,
[N. S.] Notary Public,
New York County, No. 1539.
New York Register No. 6103.

461 *Claim.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter 462 of The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of Liability as owner of the steamship "POMARON."	Claim of H. C. Bock.

NOW APPEARS H. C. Bock, a resident of the City of Hamburg, in the Empire of Germany, and
463 makes claim against the steamship *Pomaron,* as follows:

THE NATURE OF THE CLAIMANT'S CLAIM:

The claimant was the owner of certain goods, consisting of twenty bales of cotton goods, which were on board the steamship *Allegheny* when she was sunk as a result of a collision with the steamship *Pomaron* at a point off the coast of
464 Virginia on February 2nd, 1912, while the said steamship *Allegheny* was proceeding toward ports in the West Indies on a voyage from New York.

THE GROUNDS OF THE CLAIMANT'S CLAIM:

Claimant shipped from Hamburg the twenty bales of cotton goods above mentioned, in good order and condition, on board the steamship

"Berlin," to be trans-shipped at the port of New York, consigned to Alzamora, Palacio & Company, at Savanilla, all of the said goods being delivered to the steamship *Allegheny* at New York in like good order and condition as when shipped and laden thereon for carriage to the West Indies. 465

While the said shipment was on board the steamship *Allegheny,* the said steamship *Allegheny,* with the said cargo on board, was sunk on February 2nd, 1912, as a result of a collision with the steamship *Pomaron,* as aforesaid, and with all of her cargo, including that hereinbefore specified, belonging to your claimant, became a total loss. 466

THE ITEMS OF YOUR CLAIMANT'S CLAIM ARE AS FOLLOWS: 467

5 bales of cotton goods invoiced at Marks 1160.80

5 bales of cotton goods invoiced at Marks 1147.75

10 bales of cotton goods invoiced at Marks 2418.45

Marks 4727 rendered at $.238 equal $1125.03

Your claimant's claim accrued on February 2nd, 1912. No credits are due on the said claim, nor have any payments been made on account thereof. 468

The said collision was caused and contributed to by the fault and negligence of the steamship *Pomaron* and the steamship *Allegheny,* by reason of which your claimant, as owner of the cargo aforesaid, has sustained damage amounting to the sum of Eleven hundred and twenty-five and

469 *Claim.*

03/100 ($1125.03) Dollars, for which he now makes claim against the steamship *Pomaron*.

Dated, New York, December 19, 1914.

H. C. Bock,
Claimant,
By D. Roger Englar.

Harrington, Bigham & Englar,
470 Proctors for Claimant.

State of New York,
County of New York, } ss.:

D. Roger Englar, being duly sworn, deposes and says, that he is a member of the firm of Harrington, Bigham & Englar, proctors for the claimant herein; that he has read the foregoing claim and knows the contents thereof, and that
471 the same is true to the best of his knowlwedge, information and belief.

That the reason why this claim is not verified by the claimant is because the claimant is a non-resident and is a resident of Hamburg, Germany. That the sources of deponent's information are original documents which are now in his possession.

D. Roger Englar.

Sworn to before me this 19th
472 day of December, 1914.

Russell H. Porter,
[N. S.] Notary Public,
New York County.

Claim. 473

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of Liability as owner of the steamship "POMARON."	Claim of Walter D. Despard. 474

NOW APPEARS Walter D. Despard, a resident of the City of New York, and makes claim against the steamship *Pomaron,* as follows:

475

THE NATURE OF THE CLAIMANT'S CLAIM:

Claimant has recovered a judgment against Furness, Withy & Company, Limited, owner of the steamship *Pomaron,* for the sum of $13,683.09, with interest thereon from February 2nd, 1912, in the sum of $1094.85, together with $53.30 costs, amounting in all to the sum of $14,831.24, with interest from the 13th day of June, 1913, until paid, in the United States District Court for the Southern District of New York, for damages sustained by the said claimant as a result of loss of goods and merchandise which were on board the steamship *Allegheny* when she was sunk as a result of a collision with the steamship *Pomaron* at a point off the coast of Virginia on February 2nd, 1912, while the said steamship *Allegheny* was proceeding towards ports in the West Indies on a voyage from New York.

476

477 *Claim.*

THE GROUNDS OF THE CLAIMANT'S CLAIM:

The grounds of the claimant's claim are that he has recovered a judgment against the owner of the steamship *Pomaron* in the sum of $14,831.24, with interest from June 13th, 1913, until paid, in the United States District Court for the Southern District of New York, and that the
478 said judgment remains unpaid. That the said judgment was recovered for damages sustained by the claimant for loss of goods which were on board the steamship *Allegheny* when she was sunk on February 2nd, 1912, as a result of a collision with the steamship *Pomaron*, as aforesaid.

THE ITEMS OF YOUR CLAIMANT'S CLAIM ARE AS FOLLOWS:

479 Judgment obtained in the United States District Court for the Southern District of New York for $14,831.24.

Your claimant's claim accrued on the 13th day of June, 1913. No credits are due on the said claim, nor have any payments been made on account thereof.

The said collision was caused and contributed to by the fault and negligence of the steamship
480 *Pomaron* and the steamship *Allegheny*, by reason of which your claimant has sustained damage amounting to the sum of $14,831.24, for which he now makes claim against the steamship *Pomaron*.

Dated New York, December 19, 1914.

WALTER D. DESPARD,
Claimant.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Claimant.

481

STATE OF NEW YORK,
County of New York, } ss.:

WALTER D. DESPARD, being duly sworn, deposes and says, that he is the claimant herein; that he has read the foregoing claim and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

WALTER D. DESPARD.

482

Sworn to before me this 19th day of December, 1914.

RUSSELL H. PORTER,
[NOTARIAL SEAL] Notary Public,
New York County.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

483

In the Matter of The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of Liability as owner of the steamship "POMARON."	Claim of Roberts, Dutton & Company.

484

NOW APPEAR Henry Roberts, M. Fontaine, Adolf Strohm and M. Martineau, co-partners trading as Roberts, Dutton & Company, with an office and place of business at Aux Cayes, Haiti, and make claim against the steamship *Pomaron,* as follows:

THE NATURE OF THE CLAIMANT'S CLAIM:

Claimants were the owners of certain goods, consisting of 216 packages of merchandise, 198

485 packages of merchandise, 1 box pumps, 4 packages of merchandise, 10 casks hardware and 1 drum codfish, which were on board the steamship *Allegheny* when she was sunk as a result of a collision with the steamship *Pomaron* at a point off the coast of Virginia on February 2nd, 1912, while the said steamship *Allegheny* was proceeding toward ports in the West Indies on a voyage
486 from New York.

THE GROUNDS OF THE CLAIMANT'S CLAIM:

The Seaboard Trading Company shipped from New York the 216 packages of merchandise above mentioned, in good order and condition, on board the steamship *Allegheny,* consigned to your claimants at Aux Cayes, Haiti; all of the said goods being delivered to the steamship *Allegheny* at
487 New York in good order and condition and laden thereon for carriage to the West Indies.

A. Behrens & Company, shipped from New York 198 packages of merchandise, and 1 box pumps, in good order and condition, on board the steamship *Allegheny,* consigned to your claimants at Aux Cayes, Haiti; all of the said goods being delivered to the steamship *Allegheny* at New York, in good order and condition, and laden thereon for
488 carriage to the West Indies.

Huttlinger & Struller shipped from New York 4 packages of merchandise, in good order and condition, on board the steamship *Allegheny,* consigned to your claimants at Aux Cayes, Haiti; all of the said goods being delivered to the steamship *Allegheny* in good order and condition and laden thereon for carriage to the West Indies.

Vital & Valthe shipped from Liverpool 10 casks of hardware, in good order and condition, on

board the steamship *Cedric,* to be transhipped at the port of New York, consigned to your claimants at Aux Cayes, Haiti; all of the said goods being delivered to the steamship *Allegheny* at New York, in like good order and condition as when shipped and laden thereon for carriage to the West Indies. 489

There was also shipped from New York 1 drum of codfish on board the steamship *Allegheny,* in good order and condition, consigned to your claimants at Aux Cayes, Haiti; the said drum of codfish being delivered to the steamship *Allegheny* at New York, in good order and condition, and laden thereon for carriage to the West Indies. 490

While the said shipments were on board the steamship *Allegheny,* the said steamship *Allegheny,* with the said cargo on board, was sunk on February 2nd, 1912, as a result of a collision with the steamship *Pomaron,* as aforesaid, and with all of her cargo, including that hereinbefore specified, belonging to your claimants, became a total loss. 491

THE ITEMS OF YOUR CLAIMANTS' CLAIM ARE AS FOLLOWS:

Consignees: Roberts, Dutton & Company, Aux Cayes, Haiti.

Shipper: Seaboard Trading Company.

Shipment: 492

150	packages bloaters	$360.00
30	bbls. herrings	240.00
1	drum codfish	33.05
10	half drums codfish	167.00
20	quarter drums codfish	170.00
5	bbls. mackerel	60.00
	Strappings	6.00
	Freight	139.85
		$1,175.90

493 *Claim.*

Consignees: Roberts, Dutton & Company,
Aux Cayes, Haiti.
Shipper: A. Behrens & Company.

Shipment:

66	bundles lumber	$80.08
60	pieces lumber	37.35
494 70	pieces lumber	34.98
1	box raw locks	2.27
1	box pump parts	15.03
	Freight, Consul's fees, etc.	47.79
	Commission	5.43
		222.93

Consignees: Roberts, Dutton & Company,
495 Aux Cayes, Haiti.
Shipper: A. Behrens & Company.

Shipment:

1 box pumps 8.50

Consignees: Roberts, Dutton & Company,
Aux Cayes, Haiti.
496 Shipper: Huttlinger & Struller.

Shipment:

1	case roller composition	$20.25
2	bales paper	19.96
1	crate chairs	4.25
	Freight, etc	4.48
	Commission	1.22
		50.16

Claim.

497

Consignees: Roberts, Dutton & Company,
Aux Cayes, Haiti.
Shipper: Vital & Valthe.

Shipment:

10 casks hardware 157.20

498

Consignees: Roberts, Dutton & Company,
Aux Cayes, Haiti.

Shipment:

1 drum codfish 44.03

Total $1,658.72

499

Your claimants' claim accrued on February 2nd, 1912. No credits are due on the said claim, nor have any payments been made on account thereof.

The said collision was caused and contributed to by the fault and negligence of the steamship *Pomaron* and the steamship *Allegheny,* by reason of which your claimants, as owners of the cargo aforesaid, have sustained damage amounting to the sum of Sixteen hundred and fifty-eight and 72/100 ($1,658.72) Dollars, for which they now make claim against the steamship *Pomaron.*

500

Dated, New York, December 19th, 1914.

ROBERTS, DUTTON & COMPANY,
Claimants,

By
D. ROGER ENGLAR.
HARRINGTON, BIGHAM & ENGLAR,
Proctors for Claimant.

501 *Claim.*

STATE OF NEW YORK,
County of New York, } ss.:

D. ROGER ENGLAR, being duly sworn, deposes and says, that he is a member of the firm of Harrington, Bigham & Englar, proctors for the claimants herein; that he has read the foregoing claim and knows the contents thereof, and that the same
502 is true to the best of his knowledge, information and belief.

That the reason why this claim is not verified by the claimants is because the claimants are non-residents of this district. That the sources of deponent's information are original documents which are now in his possession.

D. ROGER ENGLAR.

Sworn to before me this 19th
503 day of December, 1914.

RUSSELL H. PORTER,
[SEAL] Notary Public,
New York County

504

Claim. 505

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of 506

The libel and petition of FURNESS, WITHY & COMPANY, Limited, owner of the steamship "POMARON" in a cause of limitation of liability.

The Atlantic Mutual Insurance Company makes claim against the above named petitioner, Furness, Withy & Company, Limited, and the said Steamship *Pomaron* and alleges: 507

I.—The Atlantic Mutual Insurance Company is a corporation organized under the laws of the State of New York, engaged in the business of marine insurance, and has its office at No. 49-51 Wall Street in the City of New York.

II.—At the time of the collision between the Steamship *Pomaron* and the Steamship *Alleghany* on the 2d day of February, 1912, alleged in the libel and petition herein, the cargo on board said Steamship *Alleghany* included the cargo hereinafter particularly described, all of which was totally lost by reason of said collision, to wit: 508

(1) De Lima Cortissoz & Co. shipped 200 cases kerosense and 12 cases lard, marked V. F. B. Aux-Cayes, consigned to Mrs. B. F. Birmingham

509 *Claim.*

at Aux-Cayes, of the value, including freight and other charges prepaid, of $462.50;

47 packages of merchandise, marked B. L. H. Cartagena, consigned to B. Lopez B & Hijo at Cartagena, of the value, including freight and other charges prepaid, of $407.45;

13 packages of merchandise, marked Lequerica,
510 Cartagena, consigned to Lequerica Hermanos at Cartagena, of the value, including freight and other charges prepaid, of $601.38.

6 packages of merchandise, marked R. & C. B., Cartagena, consigned to R. & C. Benediti J at Cartagena, of the value, including freight and other charges prepaid, of $227.05;

8 bales cotton prints, marked Traad, Pto Colombia, consigned to Traad Hermanos at Puerto Colombia, of the value, including freight and other
511 charges prepaid, of $917.15;

4 packages Hydraulic Press, marked L. G. P. Pto. Colombia, consigned to B. de la Torre & Co. at Puerto Colombia, of the value, including freight and other charges prepaid, of $308.12;

2 boxes candle machinery and 1 Bale Asbestos Packing, marked J. M. & C. Pto. Colombia, consigned to J. de Medina & Co. at Puerto Colombia, of the value, including freight and charges pre-
paid, of $966.89;

512 10 bbs. glassware and 10 tins matches, marked M. A. R., Pto. Colombia, consigned to Mario A. Roncallo, at Puerto Colombia, of the value, including freight and charges prepaid, of $154.27;

2000 bags wheat, box sawpoints, and 1 marble table top marked Urueto & Salzedo, Barranquille, and consigned to Urueto Salzedo & Co. at Puerto Colombia, of the value, including freight and other charges prepaid, of $5,915.36.

513

(2) Lanman & Kemp shipped 7 packages merchandise marked H. de P. R. & Co., Medellin, Cartagena, consigned to Pedro Macia & Co. at Cartagena, of the value, including freight and charges prepaid, of $235.90;

42 packages merchandise, marked O. M. A. Honda, Savanilla, consigned to Almazora, Palacio & Co. at Savanilla, of the value, including freight and other charges prepaid, of $914.20;

514

18 packages merchandise, marked M. S. & M., Savanilla, consigned to Castellano & Co. at Savanilla, of the value, including freight and other charges prepaid, of $563.10;

62 packages merchandise, marked I. M. S., Savanilla, consigned to Isaac M. Salas, at Savanilla, of the value, including freight and other charges prepaid of $1,208.70;

21 packages merchandise, marked V. H. Barranquilla, consigned to Vengoechea Hermanos at Savanilla, of the value, including freight and other charges prepaid, of $427.10;

515

11 packages merchandise, marked D L O Carta-
M
gena, consigned to Pineda, Lopez & Co., at Cartagena, of the value, including freight and other charges prepaid, of $302.80.

(3) The Seaboard Trading Company shipped 82 packages of fish marked H R & C Miragoane,

516

S T C

consigned to Herrmann, Reinbold & Co. at Miragoane, Hayti, of the value, including freight and other charges prepaid, of $532.57;

35 packages of fish, marked Gousse, Miragoane, consigned to T. Gousse at Miragoane, of the value, including freight and other charges prepaid, of $162.75;

517 *Claim.*

30 packages of Fish, marked S. P. & C. P au P., S. T. C. consigned to S. Polynice & Co. at Port au Prince, of the value, including freight and other charges prepaid, of $87.47;

160 packages of Fish and 7 bundles paper bags, marked C M P au P., consigned to Cleonard STC
518 Michel at Port au Prince, of the value, including freight and other charges prepaid of $800.27.

(4) G. Ph. Nieder shipped 7 cases lard, marked CD Aux Cayes, consigned to Ch. Dennery, at Aux N Cayes, of the value, including freight and other charges prepaid, of $71.19;

43 packages merchandise, marked L M & C N
519 P au P., consigned to L. Mevs & Co. Port au Prince, of the value, including freight and other charges prepaid, of $211.92.

(5) Barclay & Co. shipped 29 cases advertising matter, marked L N Bogota, Cartagena, consigned to Bustamente Hermanos, at Cartagena, of the value of $465.75.

520 (6) W. & A. Leaman shipped 37 packages merchandise, marked P. N. Petit Goave, consigned to P. Nicolas, at Petit Goave, of the value, including freight and other charges prepaid, of $324.39.

(7) Marcus Mason & Company shipped 64 packages bridge iron, marked Gobierno de Cundinamarco, Colombia, Barranquilla, consigned to Collector of Customs of Puerto Colombia, of the

521

value, including freight and charges prepaid, of $397.11.

(8) P. Mangual shipped 7 packages merchandise, marked G V Jeremie, consigned to G. Vigoureux at Jerennie of the value, including freight and charges prepaid, of $62.45.

522

(9) Swift & Co. shipped 2 cases cottonseed oil marked I L Port au Prince, consigned to its own order at Port au Prince, notify Isaac Leger, of the value, including freight and charges prepaid, of $17.16.

The aggregate value of above described shipments is Sixteen thousand seven hundred and forty-five dollars ($16,745.00).

523

III.—All of the cargo hereinabove described was fully insured by the several owners thereof under marine policies issued by this claimant, against marine perils during the voyage of said Steamship *Allegheny* and upon the loss thereof this claimant became liable to pay and has paid to the respective owners of said cargo, indemnity for the loss thereof; and the amounts so paid by this claimant, equal or exceed in the case of each of said shipments the values hereinbefore set forth, and the aggregate sum of $16,745.00. This claimant thereby succeeded by right of subrogation to the rights and remedies of the several owners of the above described cargo for the loss thereof and is entitled to make claim for and to recover the same.

524

525 *Claim.*

WHEREFORE the Atlantic Mutual Insurance Company makes claim upon the petitioner herein and upon said Steamship *Pomaron* for the sum of Sixteen thousand seven hundred and forty-five dollars ($16,745.00) with interest from February 2, 1912.

ATLANTIC MUTUAL INS. CO.,

526 Kneland Harrison & Hazen, by CORNELIUS ELDERT,
Vice-President.
Proctors for Claimant.

Southern District of New York, ss.:

CORNELLIUS ELDERT, being duly sworn, deposes and says that he is Vice-President of the claimant, the Atlantic Mutual Insurance Company, and that the foregoing claim is true to the best of his knowledge and belief.

CORNELIUS ELDERT.

527 Sworn to before me this 12th day of January, 1915.

WILLIAM D. WINTER,
[SEAL] Notary Public, Kings County.
Certificate filed in New York County.
Commission expires March 30, 1916, No. 14 .

528

Claim. 529

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK

In the Matter of The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of Liability as owner of the steamship "POMARON."	Claim of M. Dahens. 530

Now appears M. DAHENS, a resident of Port-au-Prince, and makes claim against the steamship *Pomaron* as follows:

531

THE NATURE OF THE CLAIMANT'S CLAIM:

The claimant was the owner of certain goods, consisting of 77 packages of merchandise, as hereinafter set forth, which were on board the steamship *Alleghany* when she was sunk as a result of a collision with the steamship *Pomaron* at a point off the coast of Virginia on February 2nd., 1912, which the said steamship *Alleghany* was proceeding towards ports in the West Indies 532 on a voyage from New York.

THE GROUNDS OF THE CLAIMANT'S CLAIM:

J. de Porry shipped from New York the goods above mentioned, in good order and condition, on board the steamship *Alleghany*, consigned to M. Dahens, at Port-au-Prince, Haiti, all of the said goods being delivered to the said steamship *Alle-*

533 *ghany* at New York in good order and condition and laden thereon for carriage to the port aforesaid.

While the said goods were on board the steamship *Alleghany,* the said steamship *Alleghany,* with the said cargo on board, was sunk on February 2nd, 1912, as a result of a collision with the
534 steamship *Pomaron,* as aforesaid, and with all of her cargo, including that hereinbefore specified, belonging to your claimant, became a total loss.

THE ITEMS OF YOUR CLAIMANT'S CLAIM ARE AS FOLLOWS:

Consignee: M. Dahens, Port-au-Prince, Haiti.

Shipment:

535

60 bags flour 2 cases cheese, 5 boxes soap, 5 bags shots, 1 bag oats, 1 case brushes, etc. 2 cases toys, 1 crate chairs,	$522.74

536 Your claimant's claim accrued on February 2nd, 1912. No credits are due on the said claim, nor have any payments been made on account thereof.

The said collision was caused and contributed to by the fault and negligence of the steamship *Pomaron* and the steamship *Allegheny,* by reason of which your claimant, as owner of the cargo aforesaid, has sustained damage amounting to the sum of Five hundred and twenty-two and 74/100

Claim. 537

($522.74) Dollars, for which he now makes claim against the steamship *Pomaron.*

Dated, New York, January 16, 1915.

M. DAHENS,
Claimant,
By Harrington, Bigham & Englar.

STATE OF NEW YORK, } ss.: 538
County of New York, }

T. CATESBY JONES, being duly sworn, deposes and says, that he is a member of the firm of Harrington, Bigham & Englar, proctors for the claimant herein; that he has read the foregoing claim and knows the contents thereof and that the same is true to the best of his knowlwedge, information and belief; that the sources of deponent's information are original documents now in his possession; that the reason this verification is not made by the claimant is that the claimant is not a resident of the United States. 539

T. CATESBY JONES.

Sworn to before me this 18th }
day of January, 1915. }

A. V. LYNCH, JR.,
Notary Public,
New York County.

540

541 *Claim.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of 542 The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of Liability as owner of the steamship "POMARON."	Claim of H. Borday.

Now appears H. Borday, a resident of Port-au-Prince, and makes claim against the steamship *Pomaron*, as follows:

543

THE NATURE OF THE CLAIMANT'S CLAIM.

The claimant was the owner of certain goods, consisting of 20 packages of merchandise, as hereinafter set forth, which were on board the steamship *Allegheny* when she was sunk as a result of a collision with the steamship *Pomaron* at a point off the coast of Virginia on February 2nd, 1912, while the said steamship
544 *Allegheny* was proceeding toward ports in the West Indies on a voyage from New York.

THE GROUNDS OF THE CLAIMANT'S CLAIM.

J. de Porry shipped from New York the goods above mentioned, in good order and condition, on board the steamship *Allegheny*, consigned to H. Borday, at Port-au-Prince, Haiti, all of the

said goods being delivered to the said steamship *Allegheny* at New York in good order and condition and laden thereon for carriage to the ports aforesaid. 545

While the said goods were on board the steamship *Allegheny,* the said steamship *Allegheny,* with the said cargo on board, was sunk on February 2nd, 1912, as a result of a collision with the steamship *Pomaron,* as aforesaid, and with all of her cargo, including that hereinbefore specified, belonging to your claimant, became a total loss. 546

THE ITEMS OF YOUR CLAIMANT'S CLAIM ARE AS FOLLOWS:

Consignee: H. Borday, Port-au-Prince, Haiti.

Shipment. 547

3 cases glassware,
2 crates jardinieres,
8 cases glassware, ...$198.69
4 barrels glassware,
2 cases pails,
1 coffee mill,

Your claimant's claim accrued on February 2nd, 1912. No credits are due on the said claim, nor have any payments been made on account thereof. 548

The said collision was caused and contributed to by the fault and negligence of the steamship *Pomaron* and the steamship *Allegheny,* by reason of which your claimant, as owner of the cargo aforesaid, has sustained damage amounting to the sum of One hundred and ninety-eight

549 *Claim.*

and 69/100 ($198.69) Dollars, for which he now makes claim against the steamship *Pomaron.*

Dated, New York, January 16, 1915.

H. BORDAY,
Claimant,
by HARRINGTON, BINGHAM & ENGLAR.

550 STATE OF NEW YORK,
County of New York, } ss.:

T. CATESBY JONES, being duly sworn, deposes and says, that he is a member of the firm of Harrington, Bigham & Englar, proctors for the claimant herein; that he has read the foregoing claim and knows the contents thereof and that the same is true to the best of his knowledge, information and belief; that the sources of de-
551 ponent's information are original documents now in his possession; that the reason this verification is not made by the claimant is that the claimant is not a resident of the United States.

T. CATESBY JONES.

Sworn to before me this 18th day of January, 1915.

A. V. LYNCH, JR.,
Notary Public,
552 New York County.

Claim. 553

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of Liability as owner of the steamship "POMARON."	Claim of A. Gagny. 554

NOW APPEARS A. Gagny, a resident of Port-au-Prince, and makes claim against the steamship *Pomaron,* as follows:

555

THE NATURE OF THE CLAIMANT'S CLAIM:

The claimant was the owner of certain goods, consisting of 2 cases of cotton goods, as hereinafter set forth, which were on board the steamship *Allegheny* when she was sunk as a result of a collision with the steamship *Pomaron* at a point off the coast of Virginia on February 2nd, 1912, while the said steamship *Allegheny* was proceeding towards ports in the West Indies on 556 a voyage from New York.

THE GROUNDS OF THE CLAIMANT'S CLAIM:

J. de Porry shipped from New York the goods above mentioned, in good order and condition, on board the steamship *Allegheny,* consigned to A. Gagny, at Port-au-Prince, Haiti, all of the said goods being delivered to the said steamship *Alle-*

557 *Claim.*

gheny at New York in good order and condition and laden thereon for carriage to the port aforesaid.

While the said goods were on board the steamship *Allegheny,* the said steamship *Allegheny,* with the said cargo on board, was sunk on February 2nd, 1912, as a result of a collision with the steamship *Pomaron,* as aforesaid, and with
558 all of her cargo, including that hereinbefore specified, belonging to your claimant, became a total loss.

THE ITEMS OF YOUR CLAIMANT'S CLAIM ARE AS FOLLOWS:

Consignee: A. Gagny, Port-au-Prince, Haiti.

Shipment:

2 cases cotton goods $266.94
559

Your claimant's claim accrued on February 2nd, 1912. No credits are due on the said claim, nor have any payments been made on account thereof.

The said collision was caused and contributed to by the fault and negligence of the steamship *Pomaron* and the steamship *Allegheny,* by reason of which your claimant, as owner of the cargo aforesaid, has sustained damage amount-
560 ing to the sum of Two hundred and sixty-six and 94/100 ($266.94) Dollars, for which he now makes claim against the steamship *Pomaron.*

Dated, New York, January 16, 1915.

A. GAGNY,
Claimant,
by HARRINGTON, BIGHAM & ENGLAR.

Claim.

561

STATE OF NEW YORK, }
County of New York, } ss.:

T. CATESBY JONES, being duly sworn, deposes and says, that he is a member of the firm of Harrington, Bigham & Englar, proctors for the claimant herein; that he has read the foregoing claim and knows the contents thereof and that the same is true to the best of his knowledge, information and belief; that the sources of deponent's information are original documents now in his possession; that the reason this verification is not made by the claimant is that the claimant is not a resident of the United States.

562

T. CATESBY JONES.

Sworn to before me this 18th }
day of January, 1915. }

A. V. LYNCH, JR.,
Notary Public,
New York County.

563

[Endorsement:]—District Court of the United States for the Southern District of New York—In the Matter of the Libel and Petition of Furness, Withy & Company, Limited, as owners of the Steamship *Pomaron* for limitation of liability.—Commissioner's Report.—Filed Jan. 18, 1915.

564

565 *Objection to Claims.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of 566 The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of its Liability as owner of the steamship "POMARON."	Notice of Objection to Claims.

SIRS:

PLEASE TAKE NOTICE, that Yang-tsze Insurance Association, Limited, U. S. Lloyds, Indemnity Mutual Marine Insurance Company, Limited,
567 Nord-Deutsche Insurance Company, Union Insurance Society of Canton, Limited, Commercial Union Assurance Company, Limited, the Corporation of Lloyds and the Aetna Insurance Company having filed claims with the commissioner in the above-entitled proceeding, hereby object and except to the allowance of the claims heretofore filed with the commissioner in this proceeding as follows:

1. G. Kattan for the sum of $161.37 for the al-
568 leged loss of or damage to goods.

2. J. L. di Picciotto, trading as J. L. di Picciotto & Company for the sum of $1,145.30 for the alleged loss of or damage to goods.

3. Antonine Joseph for the sum of $1,126.33 for the alleged loss of or damage to goods.

4. H. C. Bock for the sum of $1,125.03 for the alleged loss of or damage to goods.

569

5. Henry Roberts, M. Fontaine, Adolf Strohm and M. Martineau, copartners, trading as Robert Dutton & Company, for the sum of $1,658.72 for the alleged loss of or damage to goods.

6. Atlantic Mutual Insurance Company for the sum of $16,745.00 for the alleged loss of or damage to goods insured by it.

570

7. M. Dahens for the sum of $522.74 for the alleged loss of or damage to goods.

8. H. Borday for the sum of $198.69 for the alleged loss of or damage to goods.

9. A. Gagny for the sum of $266.94 for the alleged loss of or damage to goods; as they are not sufficiently proved on the following grounds:

571

FIRST: The averments on behalf of the claimants do not disclose any cause of action warranting the relief prayed for.

SECOND: The averments on behalf of the claimants do not disclose the existence of any claim, or lien, upon which a judgment in these proceedings can be founded.

THIRD: The claims are not sufficiently established, verified or authenticated.

572

FOURTH: The averments on behalf of the claimants are vague, uncertain, indefinite and insufficient.

FIFTH: The fund will be insufficient to pay all creditors and the claims of the Yang-tsze Insurance Association, Limited, U. S. Lloyds, Indemnity Mutual Marine Insurance Company, Limited, Nord-Deutsche Insurance Company, Union Insurance Society of Canton, Limited, Commercial Union Assurance Company, Limited, the Corpor-

ation of Lloyds and the Aetna Insurance Company having been reduced to judgments are prior in law to the aforesaid claims.

SIXTH: And in other particulars which will be shown upon the trial of, or hearing on, said claims.

WHEREFORE, the said claimants, whose claims have been reduced to judgments, pray that the claims above mentioned be adjudged to be insufficient and imperfect and that the said claims be disallowed and excluded from this proceeding.

Yours, &c.,
CONVERS & KIRLIN,
Proctors for Claimants,
Yang-tsze Ins. Assoc. Ltd., *et al.*

To:

ALEXANDER GILCHRIST, Jr., Esq.,
Clerk.

HARRINGTON, BIGHAM & ENGLAR, Esqrs.,
Proctors for Claimants, G. Kattan, J. L. di Picciotto, A. Joseph, H. C. Bock, Robert Dutton & Company, M. Dahens, H. Borday and A. Gagny.

KNEELAND, HARISON & HEWITT, Esqrs.,
Proctors for Atlantic Mutual Ins. Co.

[Endorsed:]—United States District Court, Southern District of New York—In the Matter of The Petition of Furness, Withy & Co., Ltd., for Limitation of its Liability, as Owner of the Steamship *Pomaron*—Notice of Objection to Claim—Convers & Kirlin, Proctors for Claimants, 27 William Street, New York, N. Y.—Copy Received Jan. 22, 1915, Kneeland, Harison & Hewitt—Copy Recieved Jan. 22, 1915, Harrington, Bigham & Englar, 64 Wall St., New York—Filed Jan. 22, 1915.

Order.

At a Stated Term of the United States District Court, for the Southern District of New York, held in the Post Office Building, Borough of Manhattan, City of New York, on the 25th day of January, 1915.

Present—AUGUSTUS N. HAND,
United States District Judge.

In the Matter

of

The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of its Liability as owner of the steamship "POMARON."

On the underwritten consent and on motion of Convers & Kirlin, proctors for the claimants, Yang-tsze Insurance Association, Limited, U. S. Lloyds, Indemnity Mutual Marine Insurance Company, Limited, Nord-Deutsche Insurance Company, Union Insurance Society of Canton, Limited, Commercial Union Assurance Company, Limited, the Corporation of Lloyds and the Aetna Insurance Company, it is hereby

ORDERED that the exceptions of the claimant's Yang-tsze Insurance Association, Limited, U. S. Lloyds, Indemnity Mutual Marine Insurance Company, Limited, Nord-Deutsche Insurance Company, Union Insurance Society of Canton, Limited, Commercial Union Assurance Company,

581 *Order.*

Limited, the Corporation of Lloyds and the Aetna Insurance Company to the provisional valuation of the steamship *Pomaron* at $70,419.14 be filed *nunc pro tunc* as of the 23rd day of January, 1915, and the time to serve the aforesaid exceptions to the valuation of the steamship *Pomaron* be extended to and including the 26th
582 day of January, 1915.

AUGUSTUS N. HAND,
U. S. D. J.

We consent to the entry of the foregoing order.

BURLINGHAM [illegible]IERY & BEECHER,
[illegible]ors for Petitioner.

[Endorsed:]— [illegible] States District Court,
583 Southern [illegible]rict of New York—In the matter of the petition of Furness, Withy & Co., Ltd., for limitation of its liability, as owner of the Steamship *Pomaron*—Order—Convers & Kirlin, Proctors for Claimants, 27 William Street, New York, N. Y.—Filed, Jan. 26, 1915.

584

Exception to Valuation. 585

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter
of
The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of Liability as owners of the steamship "POMARON." 586

The Yangtse Insurance Association, Ltd., United States Lloyds, Indemnity Mutual Marine Insurance Company, Ltd., Nord-deutsche Insurance Company, Union Insurance Society of Canton, Ltd., Commercial Union Assurance Company, Ltd., The Corporation of Lloyds, and the Aetna Insurance Company, Claimants herein except to the previous valuation of the Steamship *Pomaron* and her pending freight, at $70,419.14 in the order of this Court entered herein on October 8, 1914, and to the amount of the stipulation for value filed by the petitioners herein. 587

CONVERS & KIRLIN,
Proctors for Claimants Yangtse Insurance Assoc., Ltd., United States Lloyds, Indemnity Mut. Mar. Ins. Co., Ltd., Nord-deutsche Ins. Co., Union Ins. Soc. of Canton, Ltd., The Corporation of Lloyds, Etna Insurance Co. 588

To

ALEXANDER GILCHRIST, JR., ESQ., Clerk,
BURLINGHAM, MONTGOMERY & BEECHER, ESQS.,
Proctors for petitioner.

[Endorsed:]—Filed Jan. 26, 1915.

589

Answer.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

In the Matter

590 of

The Petition of FURNESS, WITHY & COMPANY, LIMITED, owner of the Steamship "POMARON," in a cause of limitation of liability, civil and maritime.

EUGENE J. F. COLEMAN, one of the persons who
591 has filed a claim in this proceeding, answering the said petition, alleges as follows:

FIRST: Claimant has duly appeared in this cause and filed a claim against the steamship *Allegheny* in the sum of $5741.27, the amount due him under two decrees of this Court, the first of which was entered in this Court on the 1st day of June, 1912, and the second of which was entered in this Court on October 6th, 1914.

592 SECOND: Claimant admits that the petitioner is a British corporation and that the petitioner was the owner of the steamship *Pomaron*. Claimant denies the other allegations contained in Article First of the petition.

THIRD: Claimant denies the allegations contained in Articles Second and Third of the petition, except in so far as they are found to be facts

593

by this Court and the Circuit Court of Appeals for the Second Circuit in the case of Eugene J. F. Coleman against Furness, Withy & Company, Limited.

FOURTH: Claimant denies that said collision was due solely to the fault of the steamship *Allegheny,* and alleges that the said collision was the result of the fault of both the steamship *Pomaron* 594
and the steamship *Allegheny.*

FIFTH: Claimant admits the allegations contained in Article Fifth of the petition.

SIXTH: Claimant has no knowledge or information sufficient to form a belief as to the allegations contained in Article Sixth of the petition.

SEVENTH: Claimant admits the allegations contained in Article Seventh of the petition. 595

EIGHTH: Claimant has no knowledge or information sufficient to form a belief as to the allegations contained in Article Eighth of the petition.

NINTH: Claimant admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court, but denies that all and singular the premises of the petition are true, as alleged in Article Ninth thereof.

596

TENTH: Further answering the said petition, claimant alleges that an action was instituted by him in this Court against Furness, Withy & Company, Limited, the petitioner herein, as owner of the steamship *Pomaron,* for the sum of $5234.23, with interest thereon, for damage sustained by this claimant as a result of the collision mentioned in the petition. The said cause came on for trial before the United States District Court for the

597 Southern District of New York and an opinion was handed down holding that the steamship *Pomaron* was at fault for the collision. Thereafter and on or about the 13th day of June, 1913, a final decree was entered in the said cause, wherein your claimant was awarded a judgment against Furness, Withy & Company, Limited, in the sum
598 of $5234.23, with interest thereon from February 2, 1912, in the sum of $418.74, together with $53.30 costs, amounting in all to the sum of $5706.27. An appeal was taken from the said decree by Furness, Withy & Company, Limited, to the United States Circuit Court of Appeals for the Second Circuit, and an opinion was handed down in the said Court affirming the decree entered in the United States District Court for the Southern District of New York. A mandate of the said
599 United States Circuit Court of Appeals for the Second Circuit was duly issued, directing that the said decree of the United States District Court for the Southern District of New York be affirmed and that your claimant be awarded costs to the extent of $35.00 in the Circuit Court of Appeals. A further decree was thereupon entered in the United States District Court for the Southern District of New York on or about October 6th, 1914, wherein your claimant was awarded a fur-
600 ther judgment in the sum of $35.00 against the said petitioner. Your claimant, therefore, alleges that the matters and things set forth in the petition herein, in so far as the said petitioner seeks to relieve itself from liability for the damage sustained as a result of the said collision, is *res adjudicata,* and that the only issue which can now be considered by this Court is the issue of whether or not the said petitioner is entitled to limit its liability.

601

WHEREFORE, your claimant prays that the said petition be dismissed in so far as the petitioner prays that the Court adjudge that the said petitioner is not liable to any extent for any loss, damage or injury nor for any claim whatsoever in any way arising out of, or in consequence of the collision aforesaid.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Claimant, 602
64 Wall Street,
New York City.

STATE OF NEW YORK, }
County of New York, } ss.:

EUGENE J. F. COLEMAN, being duly sworn, deposes and says, that he is the claimant herein; that he has read the foregoing answer and knows the contents thereof, and that the same is true to 603
the best of his knowledge, information and belief.

EUGENE J. F. COLEMAN.

Sworn to before me this 30th }
day of January, 1915. }

WILLIAM H. HARTZELL, JR.,
[N. S.] Notary Public,
New York County.

[Endorsed:] — United States District Court, Southern District of New York.—In the Mat- 604
ter of the Petition of Furness, Withy & Company, Limited, owner of the Steamship *Pomaron*, in a cause of limitation of liability, civil and maritime.—Answer of Eugene J. F. Coleman.—Harrington, Bigham & Englar, Proctors for Claimant, 64 Wall Street, New York City.—Copy received Jan. 30, 1915, Burlingham, Montgomery & Beecher.—Filed Jan. 30, 1915.

605 *Answer.*

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

In the Matter

606 of

The Petition of FURNESS, WITHY & COMPANY, LIMITED, owner of the Steamship "POMARON," in a cause of limitation of liability, civil and maritime.

ANTOINE JOSEPH, one of the persons who has 607 filed a claim in this proceeding, answering the said petition, alleges as follows:

FIRST: Your claimant alleges that he has duly filed a claim in this proceeding as owner of certain cargo which was laden on board the steamship *Allegheny* at the time she sank as a result of a collision with the steamship *Pomaron,* which occurred on February 2nd, 1912, in the sum of $1126.33.

608 SECOND: Claimant admits that the petitioner is a British corporation and that the petitioner was the owner of the steamship *Pomaron.* Claimant denies the other allegations contained in Article First of the petition.

THIRD: Claimant denies the allegations contained in Article Second of the petition, except in so far as they are expressly admitted in Article Eleventh hereof.

Answer.

609

FOURTH: Claimant denies the allegations contained in Article Third of the petition, except in so far as they are expressly admitted in Article Eleventh hereof.

FIFTH: Claimant denies that the said collision was not caused or contributed to by the fault of the steamship *Pomaron,* and alleges that the said collision was caused by the fault of both the 610 steamship *Pomaron* and the steamship *Allegheny.*

SIXTH: Claimant admits the allegations contained in Article Fifth of the petition.

SEVENTH: Claimant has no knowledge or information sufficient to form a belief as to the allegations contained in Article Sixth of the petition. 611

EIGHTH: Claimant admits the allegations contained in Article Seventh of the petition.

NINTH: Claimant has no knowledge or information sufficient to form a belief as to the allegations contained in Article Eighth of the petition.

TENTH: Claimant admits the admiralty and 612 maritime jurisdiction of the United States and of this Honorable Court, but denies that all and singular the premises of the petition are true, as alleged in Article Ninth thereof.

ELEVENTH: FURTHER ANSWERING the said petition, claimant alleges that on or about the 1st day of February, 1912, the German steamship *Allegheny,* with a general cargo on board, in-

613 cluding a quantity of cargo owned by your claimant, the details of which have been set forth in a claim filed in this proceeding by your claimant, left New York, bound for various ports in the West Indies. While proceeding on her voyage, and at about 11 A. M. on the morning of February 2nd, 1912, the *Allegheny* was run into by the British steamer *Pomaron* at a point about 90
614 miles east of Cape Henry, Virginia, as a result of which the *Allegheny* was sunk, and with her cargo, including that owned by your claimant, became a total loss. Upon information and belief, your claimant alleges that prior to the collision the *Allegheny* was proceeding on a course of south 4° west, magnetic, and the *Pomaron*—which had left Hampton Roads bound for European ports—was standing on a course of east
615 by north ¼ north, magnetic. The weather was clear, and both vessels were proceeding at full speed—the *Allegheny* making about 12 or 13 knots per hour—the *Pomaron* about 9 knots per hour. When the *Allegheny* and the *Pomaron* were first called upon to navigate with reference to each other, they were on crossing courses—the *Allegheny* having the *Pomaron* on her own starboard hand. At this time the navigating officer of the *Allegheny* was in the chart room,
616 working up his position from observations taken shortly before. There was no officer on the bridge, and no sufficient lookout was being maintained. On the other hand, the chief officer of the *Pomaron* was in charge of the navigation of his vessel, and first made out the *Allegheny* several miles away at a bearing given in the log book of the *Pomaron* as northeast. The *Allegheny* and the *Pomaron* continued to approach

each other until they were about a mile apart, at which time the officer in charge of the *Pomaron* observed that the *Allegheny* was continuing on her southerly course proceeding at a speed of between 12 and 13 knots per hour, with no one on her bridge. In that situation the *Pomaron* blew a signal of one whistle and ported her helm, and although her whistle remained unanswered, and 618
although it was apparent that the *Allegheny* was keeping her course and speed, the *Pomaron* continued on at her full speed of about 9 knots and under her port helm, until the distance between the steamers was reduced from one mile to half a mile. At this point the *Allegheny* blew a signal of two whistles, indicating that her helm was being starboarded and that she would continue ahead and across the bows of the *Pomaron.* Thereupon the engines of the *Pomaron* were re- 619
versed at full speed and her helm put hard-a-port and kept hard-a-port until the stem of the *Pomaron* came into collision with the starboard side of the *Allegheny* at a point abaft the engine room, doing such damage to the *Allegheny* that she shortly afterwards filled and sank, and with her cargo, became a total loss.

TWELFTH: The said collision and consequent damage were not caused or contributed to by any 620
fault or negligence on the part of your claimant, but were caused by the fault and negligence of both the steamship *Allegheny* and the steamship *Pomaron.* The steamship *Allegheny* was at fault in the particulars as pointed out in the petition herein, and the *Pomaron* was at fault in the following particulars:

1. In that a good lookout was not maintained.

621 *Answer.*

2. In that she failed to keep her course as well as her speed as required by the starboard-hand-rule.

3. In that, while she and the *Allegheny* were approaching each other on crossing courses, and when they were a mile apart, she negligently blew a signal of one whistle
622 and ported her helm in a reckless attempt to cross the bows of the *Allegheny*.

4. In thereafter continuing at full speed under a port helm until the distance between the vessels was decreased from one mile to a half a mile while her one whistle signal remained unanswered, and while it was obvious that the *Allegheny* was continuing ahead without change of course or speed, with no
623 one on her navigating bridge.

5. In failing seasonably to stop and reverse in order to avoid a collision.

6. In putting her helm to port instead of to starboard after the *Allegheny* blew her a signal of two whistles when the vessels were half a mile apart.

WHEREFORE, your claimant prays that the said
624 petition be dismissed in so far as the petitioner prays that the Court adjudge that the said petitioner is not liable to any extent for any loss, damage or injury nor for any claim whatsoever in any way arising out of, or in consequence of the collision aforesaid.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Claimant,
64 Wall Street,
New York City.

Answer.

STATE OF NEW YORK, }
County of New York, } ss.:

T. CATESBY JONES, being duly sworn, deposes and says that he is a member of the firm of Harrington, Bigham & Englar, proctors for the claimant herein; that he has read the foregoing answer and knows the contents thereof and that the same is true to the best of his knowledge, information and belief. That the sources of deponent's information are original documents now in his possession. That the reason this verification is not made by the claimant is that the claimant is not a resident of the United States.

T. CATESBY JONES.

Sworn to before me this 30th }
day of January, 1915. }

WILLIAM H. HARTZELL, JR.,
Notary Public,
New York County.

[Endorsed:]—United States District Court, Southern District of New York—In the Matter of the Petition of Furness, Withy & Company, Limited, owner of the Steamship *Pomaron*, in a cause of limitation of liability, civil and maritime—Answer of Antonie Joseph—Harrington, Bigham & Englar, Prictors for Claimant, 64 Wall Street, New York City—Copy received, Jan. 30, 1915, Burlingham, Montgomery & Beecher.

Filed Jan. 30. 1915

629 *Order.*

At a Stated Term of the United States District Court for the Southern District of New York, held in the Post Office Building, in the Borough of Manhattan, City of New York, on the 1 day of February, 1915.

630 Present—Hon. JULIUS M. MAYER,
U. S. D. J.

In the Matter
of
The Petition of FURNESS, WITHY & COMPANY, Limited, for Limi-
631 tation of its Liability as owner of the steamship "POMARON."

Order Extending Claimants' Time to Answer.

On the underwritten consent and on motion of Convers & Kirlin, proctors for the Yang-tsze Insurance Association, Limited, *et al.*, it is hereby

ORDERED that the time of the claimants, Yangtsze Insurance Association, Limited, U. S. Lloyds,
632 Indemnity Mutual Marine Insurance Company, Limited, Nord-Deutsche Insurance Company, Union Insurance Society of Canton, Limited, Commercial Union Assurance Company, Limited, the Corporation of Lloyds and the Aetna Insurance Company, to answer the petition herein, be and it hereby is extended to and including the 10th day of February, 1915.

J. M. MAYER,
U. S. D. J.

Note of Issue. 633

We consent to the entry of the foregoing order,
Burlingham Montgomery & Beecher
Proctors for Petitioner.

[Endorsed:]—United States District Court, Southern District of New York—In the Matter of The Petitioner of Furness, Withy & Company, Ltd., for Limitation of its Liability as Owner of the Steamship *Pomaron*.— 634
Order Extending Claimants' Time to Answer—Convers & Kirlin, Proctors for Claimants, 27 William Street, New York, N. Y.—Filed Feb. 2, 1915.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

635

In the Matter of The Petition of FURNESS, WITHY & COMPANY, LTD., Owner of the Steamship "POMARON" for limitation of liability.	58/112.

636

Motion to open default.

ARTHUR B. CHURCH, Esq., for the motion.
H. SNOWDEN MARSHALL, Esq., opposed.

Returnable April 16, 1915, 10 A. M.

[Endorsed:]—Filed April 15, 1915.

637 *Notice of Motion.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

638 The Petition of FURNESS, WITHY & COMPANY, LTD., owners of the Steamship "POMARON," for limitation of liability.

Sir:

PLEASE TAKE NOTICE that upon the annexed consents and upon the annexed affidavit of
639 Arthur B. Church, verified the 15th day of April 1915, a motion will be made before the United States District Court for the Southern District of New York at a Term thereof to be held at the Post Office Building, on the 16th day of April 1915, at ten o'clock A. M. or as soon thereafter as counsel can be heard for the annexed proposed order.

Dated, New York, April 15, 1916.

640 Yours, etc.,

ARTHUR B. CHURCH,
Proctor for Claimant,
Office and Post Office Address,
27 Cedar Street,
Borough of Manhattan,
City of New York.

To:

H. SNOWDEN MARSHALL, ESQ.,
U. S. District Attorney.

Affidavit. 641

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

642 The Petition of FURNESS, WITHY & COMPANY, LTD., owners of the Steamship "POMARON," for limitation of liability.

STATE OF NEW YORK,
County of New York, } ss.:

SOUTHERN DISTRICT OF NEW YORK:

643 Arthur B. Church, being duly sworn, deposes and says: I am proctor for Gerhard Arlt, the claimant herein. Said Arlt is in default for not filing a certain claim against the proceeds of the Steamship *Pomeron* within the time allowed by the monition herein. All of the proctors for all the claimants herein, with the exception of H. Snowden Marshall, United States District Attorney, have consented that the said default be opened and the said Arlt permitted to file a claim against the proceeds of the Steamship Pomaron in the sum of Two thousand ($2,000) Dollars. 644

WHEREFORE, deponent prays that the annexed proposed order be made.

ARTHUR B. CHURCH.

Sworn to before me, this
15th day of April, 1915.

JOHN K. DUBYEE,
Notary Public No. 173, New York County,
Registers No. 7105.

Seal.

645 *Consent.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

The Petition of FURNESS, WITHY & 646 COMPANY, LTD., owners of the Steamship "POMARON," for limitation of liability.

We, the undersigned, proctors for all of the claimants herein, hereby consent that the default of Gerhard Arlt, for failure to file claim herein on behalf of himself and the members of the crew of the Steamship *Alleghany*, be opened, and that the said Gerhard Arlt be permitted to file a 647 claim against the proceeds of the Steamship *Pomaron* in the sum of Two thousand ($2000) Dollars, and that the same be referred to the Commissioner herein, and that an order to the above effect may be entered without further notice.

Dated New York, April 8, 1915.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Coleman, *et al.*

648 KNEELAND, HARRISON & HEWITT,
Proctors for Fed. Ins. Co., *et al.*

BARRY, WAINWRIGHT, THACHER & SYMMERS,
Proctors for Oloffson, *et al.*

WARD D. WILLIAMS,
Proctor for Boston Ins. Co.

CONVERS & KIRLIN,
Proctors for Nord-deutsche Ins. Co., Yangtse Ins. Co., *et al.*

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Petitioner.

Order. 649

At a Stated Term of the United States District Court held in and for the Southern District of New York on the 16th day of April, 1915.

Present—Hon. LEARNED HAND,
Judge.

650

In the Matter

of

The Petition of FURNESS, WITHY & COMPANY, LTD., owners of the Steamship "POMARON," for limitation of liability.

651

Upon the annexed consents under date of April 8, 1915, and upon the annexed affidavit of Arthur B. Church, Esq., verified the 15th day of April, 1915, together with notice of motion thereupon, it is on motion of Arthur B. Church, Proctor for Gerhard Arlt.

ORDERED that the default of Gerhard Arlt for failure to file claim herein against the proceeds of the Steamship *Pomaron* on behalf of himself and members of the crew of the Steamship *Alleghany*, be vacated and that said Gerhard Arlt be permitted to file such claim within one day from date hereof and that the same be referred to the Commissioner herein, Hon. Alexander Gilchrist. 652

LEARNED HAND,
U. S. D. J.

[Endorsed:]—Filed April 17, 1915.

653 *Commissioner's Additional Report.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

654 The libel and petition of FURNESS, WITHY & COMPANY, LTD., as owners of the steamship "POMARON" for limitation of liability.

To the United States District Court for the Southern District of New York:

I, Alex. Gilchrist, Jr., the Commissioner named
655 in the order of this court made and entered in this proceeding on the 8th day of October, 1914, before whom the claims of all persons for any loss, damage or injury occasioned by or resulting from the collision set forth in the libel and petition herein were required to be presented on or before the 18th day of January, 1915, do respectfully report that the following additional claim has been presented to me:

656 That of Gerhard Alt, personally and in behalf of the officers and crew of the steamship *Alleghany* for loss of personal effects amounting to $2,000.

That the said claim is hereto annexed and made a part of this report; all of which is respectfully submitted.

New York, April 22, 1915.

ALEX. GILCHRIST, JR.,
Commissioner.

Claim. 657

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter
of
The Petition of FURNESS, WITHY & COMPANY, LTD., Owner of the Steamship "POMARON," for Limitation of Liability. 658

And now comes Gerhard Arlt, personally, and in behalf of the officers and crew of the Steamship *Alleghany,* and makes claim in the above matter against Furness, Withy & Company, Ltd., and the 659
proceeds of the Steamship *Pomaron* as follows:

FIRST: The claimant resides at 448 Avon Avenue, in the City of Newark and State of New Jersey, and at the time of the collision hereinafter mentioned was a member of the crew of the Steamship *Alleghany,* and was serving as chief engineer aboard said vessel. That at all the times hereinafter mentioned said Steamship *Alleghany* was owned by the Hamburg-American 660
Line, and the said Steamship *Pomaron* was owned by Furness, Withy & Company, Ltd., the petitioner herein.

SECOND: On the 2nd day of February, 1912, at about 11:15 o'clock in the forenoon, the said Steamship *Alleghany,* while on a voyage from

661 *Claim.*

New York to various ports in the West India Islands, came in collision with the Steamship *Pomaron* at a point in the Atlantic Ocean about 37° 32′ north latitude and 74° west longitude, and as a result of said collision the steamship *Alleghany* sank and was totally lost, together with the personal clothing and effects of her officers and crew.

662

THIRD: By reason of said sinking and the loss of his personal clothing and effects, the claimant and the various members of the crew who have assigned their claims to the claimant herein, sustained damages in the sum of Two thousand ($2,000) Dollars, for which amount claimant herein makes claim against Furness, Withy & Company, Ltd., the petitioner herein, and the proceeds of the said Steamship *Pomaron.*

663

FOURTH: The claimant and the other members and officers of the crew of the Steamship *Alleghany* have not been paid for said loss or any part thereof, and no credits against said claims or any of them exist in favor of Furness, Withy & Company, Ltd., the petitioner herein and the owner of the said Steamship *Pomaron.*

664

FIFTH: By reason of the premises there is now due the claimant from the said petitioner and the proceeds of the said Steamship *Pomaron* the total sum of Two thousand ($2,000) Dollars.

WHEREFORE the claimant presents this claim and prays that this Honorable Court will decree that

Claim. 665

he recover from the petitioner herein and against the proceeds of the Steamship *Pomaron,* the damages aforesaid; and that he have such other and further relief as may be just.

ARTHUR B. CHURCH,
Proctor for Claimant,
Office and Post Office Address,
27 Cedar Street, 666
Borough of Manhattan, City of New York.

To:

ALEXANDER GILCHRIST, ESQ.,
Commissioner,

BURLINGHAM, MONTGOMERY & BEECHER, ESQS.,
Proctors for Petitioner.

667

668

669 *Claim.*

STATE OF NEW YORK, }
County of New York } ss.:
Southern District of New York, }

ARTHUR B. CHURCH, being duly sworn, deposes and says: I am the proctor for the claimant herein. I have read the foregoing claim and know the contents thereof and the same is true
670 on information and belief. The reason this verification is made by me and not by the claimant is that the latter is not now within the County of New York where I have my office.

ARTHUR B. CHURCH.

Sworn to before me, this }
8th day of April, 1915. }

JOHN S. DURYEE,
[SEAL] Notary Public No. 173,
671 New York County.

Registers No. 7105.
Commission expires March 30, 1917.

[Endorsed:]—United States District Court, Southern District of New York.—In the Matter of the Petition of Furness, Withy & Company, Ltd., etc.—Claim, Gerhard Arlt and Crew S. S. *Alleghany*—Arthur B. Church,
672 Proctor for Claimant, 27 Cedar Street, Boro. Manhattan, New York City.

[Endorsed:] — United States District Court, Southern District of New York.—In the Matter of the Libel and Petition of Furness, Withy & Company, Limited, as owner of the Steamship *Pomaron* for limitation of liability.—Report on Additional Claim.—Filed April 22, 1915.

Petitioner's Bill of Costs. 673

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

The libel and petition of FURNESS, WITHY & COMPANY, Limited, owner of the steamship "POMARON" for limitation of liability. 674

PETITIONER'S BILL OF COSTS AS PROVIDED FOR UNDER FINAL DECREE.

DISBURSEMENTS. 675

Commissioner's fee for receiving claims.	$50.00
Advertising monition in Evening Mail..	80.64
Marshal's fees.....	2.12
Notary's fees.....	3.00
Premium on stipulation for costs.....	2.50
Clerk's fees heretofore taxed (in part)	2.10
	$140.36
Clerk's final fees on entering decree and disbursing fund	944.89
	$1,085.25

676

Taxed April 22, 1915.

ALEXANDER GILCHRIST, Jr.,
Clerk.

677 *Petitioner's Bill of Costs.*

STATE OF NEW YORK, }
County of New York, } ss.:

CHAUNCEY I. CLARK, being duly sworn, says that he is an attorney in the office of Burlingham, Montgomery & Beecher, the proctors for the petitioner herein, and has had charge of the above proceeding in behalf of the petitioner; that the
678 above disbursements have been necessary in the limitation proceedings, and the above amounts have been paid as above set forth.

CHAUNCEY I. CLARK,

Sworn to before me, this 22d day of April, 1915.

ADELINE K. SCHNEIDER,
[SEAL] Notary Public No. 3436,
New York County.

679 Register's No. 6209.
Commission expires March 30, 1916.

[Endorsed:]—District Court of the United States, Southern District of New York—In the Matter of the Libel and Petition of Furness, Withy & Co., Ltd., owner of the S. S. *Pomaron*, for Limitation of Liability—Petitioner's Bill of Costs under Final Decree—Burlingham, Montgomery & Beecher, Proc-
680 tors for Petitioner, 27 William Street, Borough of Manhattan, New York City.

Notice of taxation of the within bill of costs hereby waived.

CONVERS & KIRLIN.

Notice. 681

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

682

The libel and petition of FURNESS, WITHY & COMPANY, Limited, owner of the steamship "POMARON" in a cause of limitation of liability.

SIRS:

TAKE NOTICE that the within final decree will be presented for settlement at the office of the Clerk 683 of this Court at his offices in the Post Office Building, Borough of Manhattan, City of New York, on the 22nd day of April, 1915, at 10 o'clock A. M.

Dated, New York, April 21, 1915.

Yours, etc.,

BURLINGHAM, MONTGOMERY & BEECHER,

Proctors for Petitioner.

To: 684

MESSRS. CONVERS & KIRLIN,

Proctors for certain cargo claims.

685 *Final Decree.*

At a Stated Term of the District Court of the United States for the Southern District of New York, held in the Court Rooms thereof in the Borough of Manhattan, City of New York, on the 22nd day of April, 1915.

686 Present—Hon. Learned Hand, District Judge.

In the Matter of The libel and petition of FURNESS, WITHY & COMPANY, Limited, 687 owner of the steamship "POMARON" for limitation of liability	Final Decree.

WHEREAS a petition was filed in this Court on October 5, 1914, by Furness, Withy & Company, Limited, alleging that it was at that time and at the time of the collision hereinafter mentioned a British corporation and was at said time sole owner of the steamship *Pomaron;* that the *Pom-*
688 *aron* while on a voyage from Baltimore, bound for Leith, laden with grain and general cargo, collided on the high seas with the steamship *Alleghany* of the Hamburg American Line at about 11:15 A. M. February 2, 1912, in about 37° 32′ N. latitude and 74° W. longitude; that the steamship *Alleghany* sank as a result of said collision and her cargo, personal effects of the crew and everything connected with the vessel became a total

loss; that the claimants made against the petitioner for damages alleged to have been caused by or to have resulted from the collision in the sum of upwards of $200,000; that by reason of the collision the voyage of the *Pomaron* was broken up and abandoned, and she returned to Newport News, Va., for repairs; that the freight earned by the *Pomaron* on said voyage amounted to the sum 690
of $6,029.37; that the value of the *Pomaron* at the termination of said voyage, after the collision with the *Alleghany* amounted to the sum of $64,389.77; that the *Pomaron* was damaged to the extent of $15,610.23; and that the petitioner claimed exoneration of liability for said collision, or, in the alternative, claimed the benefit of the limitation of liability provided in sections 4283, 4284 and 4285 of the Revised Statutes of the United States and of the various statutes amend- 691
atory thereof and supplemental thereto, and that to that end the petitioner was willing to give a stipulation with sureties for the payment into Court of the amount or value of its interest in the steamship *Pomaron* in whatever sum should be ordered, as provided by the aforesaid statutes and by the rules of practice of the Supreme Court of the United States and of this Court in matters of admiralty cognizance; and the said petition having set forth the facts and circum- 692
stances by reason of which exemption from liability was claimed and prayed that the Court would cause a due appraisement to be made of the amount or value of the petitioner's interest in said steamship *Pomaron* and would make an order for the giving of a stipulation with surety for the payment thereof into Court of the amount of petitioner's said interest whenever the Court

should so order, and cause a monition to be issued to all persons claiming damages for any loss, damage or injury caused or resulting from the collision aforesaid, citing them to appear before a Commissioner to be named by the Court and make due proof of their respective claims, and also to appear and answer the allegations of the petition; and having further prayed that the
694 Court on the filing of such a stipulation as may be determined to be proper, would issue its injunction restraining the commencement, continuation or prosecution thereafter of any suit, action or legal proceeding of any nature whatever against the petitioner or the steamship *Pomaron* in respect of any claim or claims arising out of the aforesaid accident, except in the present proceeding instituted as above, and that the Court
695 would adjudge that the petitioner is not liable to any extent for any loss, damage or injury nor for any claim whatsoever in any way arising out of or in consequence of the collision above described, or that, if liable, its liability be limited to the amount or value of its interest in the steamship *Pomaron* at the end of the voyage on which she was engaged at the time of said accident and her pending freight, and that the moneys paid or secured to be paid as aforesaid, be
696 divided *pro rata* among such claimants as may duly prove their claims before the Commissioner to be appointed herein saving to any parties any priority to which they may be entitled; and

WHEREAS certain affidavits were made and filed as to the value of the petitioner's interest in the said steamship *Pomaron* on the date of her arrival in Newport News, Va., on February 4, 1912, after the collision between her and the steamship

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Alleghany, showing the value of petitioner's interest as of February 4, 1912, the date of the termination of her voyage, to be $70,419.14; and

WHEREAS on reading and filing the said affidavits an order was entered by the Court ordering the petitioner to file with the Clerk of this Court a stipulation for value in the sum of $70,500, with good and sufficient surety for the payment of said sum of $70,500 into Court, with interest thereon from February 4, 1912, being the date of the termination of the voyage of the steamship *Pomaron,* and further ordering that unless exceptions be filed to said stipulation for value in the sum of $70,500 on or before January 23, 1914, such stipulation for value shall stand as the appraisal by this Court of the amount or value of the interest of the petitioner in said steamship *Pomaron* and her pending freight; and

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WHEREAS on the filing of the said stipulation for value as ordered by the Court, an order was duly made and entered herein on or about the 8th day of October, 1914, by this Court and directing that the beginning or prosecution of any and all suits, actions or legal proceedings of any nature or description whatsoever against the steamship *Pomaron* or her owners in respect of any claim arising out of or connected with the collision between the steamship *Pomaron* and the steamship *Alleghany* on February 2, 1912, and the subsequent sinking of said steamship *Alleghany* on the same day, be stayed and restrained until the hearing and determination of the proceedings on the petition and directing that the service of the order as a restraining order be made in the manner usual in such proceedings; and

700

701 *Final Decree.*

WHEREAS an order was duly made and entered herein on or about the 8th day of October, 1914, directing that a monition issue out of and under the seal of the Court against all persons claiming damages for any and all losses, damages or injuries occasioned by or resulting from the collision between the steamship *Pomaron* and the steamship *Alleghany* on February 2, 1912,
702 citing all such persons to appear before this Court and make due proof of their respective claims on or before the 18th day of January, 1914, at 10:30 o'clock in the forenoon, and further ordering that Alexander Gilchrist, Jr., Esq., be appointed Commissioner to take proof of all claims presented pursuant to such monition subject to the right of any person to controvert or question the same with liberty also to
703 any person or persons claiming damages as aforesaid who shall have presented his or their claims to said Commissioner under oath to answer said petition, and further ordering that public notice of such monition should be given by publication in The Evening Mail, a newspaper published in the City of New York, as directed, and that a copy of said monition be served on the respective attorneys or proctors of all persons who at the time of making the other had filed
704 libels or begun suits for damage or loss or injury occasioned by or arising out of the collision aforesaid, together with a copy of the order, such service to be made at least thirty days before the return day; and

WHEREAS a monition citing all persons claiming damages for any loss, damage, injury or destruction occasioned by the collision aforesaid or by the subsequent sinking of the steamship

Alleghany was thereafter and on the 9th day of October, 1914, duly issued in pursuance of the last mentioned order, and said monition was thereafter, to wit, on the 18th day of January, 1915 the return day provided by the order, duly returned by the Marshal of the United States for the Southern District of New York with proof of the due citation of all parties interested by the due public notice of said monition made by the publication thereof in conformity with the direction for such service in said last mentioned order; and

WHEREAS the said Alexander Gilchrist, Jr., Esq., the Commissioner appointed as aforesaid, has duly made his report whereby it appears that claims were presented by the following in pursuance of said monition and order before the said return day, to wit:

Nord-Deutsche, Ins. Co., Union Ins. Co. of Canton, Ltd., the Corporation of Lloyds and Aetna Insurance Co.
N. H. Silvera
Laura Moore
Walter Oloffson, *et al.*
Eugene J. F. Coleman
Orton G. Orr
Francis W. Van Praag
Marshall K. Weidensaul
Louis Berschman
Hazan & Company
Yang-Tsze Ins. Assn., Ltd., *et al.*
Boston Insurance Company
Federal Insurance Company, *et al.*
United States of America
G. Kattan

709 *Final Decree.*

J. L. de Picciotto
A. Joseph
H. C. Bock
Walter D. Despard
Robert Dutton & Co.
Atlantic Mutual Insurance Co.
M. Dahens
710 H. Borday
A. Gagny, and

WHEREAS the defaults of all other persons than those who have presented claims as aforesaid were taken at the time of the return of said monition, to wit, the 18th day of January, 1915, and were duly noted and entered; and

WHEREAS this Court has by an order entered herein April 17, 1915, opened the default of Ger-
711 hard Arlt and said Gerhard Arlt has presented to the Commissioner, and the Commissioner has duly reported his claim under date of April 22, 1915; and

WHEREAS no claims other than the foregoing have been presented to Alexander Gilchrist, Jr., Esq., the Commissioner appointed as aforesaid, or have been filed by leave of this Court; and

WHEREAS on the return of the monition on the 18th day of January, 1915, proclamation was duly
712 made citing all persons claiming damages as aforesaid to appear and present their claims and to answer the libel and petition herein, and no other persons than those above mentioned having presented claims, appeared or answered; and

WHEREAS the time of all persons to file claims, file answer to the petition or exceptions to the stipulation for value has now expired and has not been extended by order of the Court, or

otherwise, and the right of all other persons to present claims is barred; and

WHEREAS the petitioner and all the claimants herein have compromised and settled the issues between them, and in consideration of the said compromise and settlement it has been agreed between the petitioner and all the claimants:

1. That the amount or value of the petitioner's 714
interest in the steamship *Pomaron* and her freight as of the date of her return to Newport News on February 4, 1912, after the collision, was and it is $70,419.14; and

2. That the exceptions filed to the provisional valuation herein are waived; and

3. That the collision aforesaid and the losses, injuries and damages consequent thereon occurred 715
without the petitioner's privity or knowledge; and

4. That the surety on petitioner's stipulation for value shall be and is exonerated from any and all liability in excess of the said $70,419.14 and interest by reason of any matter growing out of said collision; and

5. That the petitioner shall be and is exoner- 716
ated from any and all liability in excess of said $70,419.14 with interest thereon at 6% from February 4, 1912, amounting to $13,599.57, plus the additional amount of $9,139.68, with interest thereon at 2½% from October 1, 1913, amounting to $356.51, the latter amount being the amount received on October 1, 1913, from the owners of the steamship *Alleghany* as directed by the final decree of this Court entered September 26, 1913,

in the matter of the libel and petition of the Hamburg-American Line, owner of the steamship *Alleghany,* for limitation of liability; and

6. That on the payment into Court or to the claimants by the petitioner, of the sums of $70,-419.14, with interest amounting to $13,599.57 and $9,139.68, with interest amounting to $356.51,
718 as set forth in paragraph numbered 5 above, making an aggregate sum of $93,514.90, all bonds and stipulations for value and costs given by the petitioner for the payment into Court of any sum or sums of money representing the petitioner's interest in the steamship *Pomaron* and freight moneys, or for costs in this proceeding, shall be deemed to have been fulfilled and satisfied, and shall be forthwith, without
719 further consent or notice, cancelled and discharged of record by order of the Court; and

WHEREAS in consideration of the said compromise and settlement, the several claimants herein by agreement have fixed and adjusted the amounts of their several losses consequent on the said collision at the following sums, to wit:

Nord Deutsche Ins. Co., Union Ins. Co. of Canton, Ltd., the Corporation of	
720 Lloyds and Aetna Insurance Co.	$14,252.02
Interest from June 13, 1913,	1,591.47
M. H. Silvera	2,135.59
Interest from June 13, 1913,	238.48
Laura Moore	11,977.41
Interest from June 13, 1913	1,337.48
Walter Oloffson, *et al.*	2,039.97
Interest from June 13, 1913,	227.89
Eugene J. F. Coleman	5,706.27
Interest from June 13, 1913,	637.20

Eugene J. F. Coleman	35.00	
Interest from October 2, 1914,	1.17	
Orton G. Orr	28,250.85	
Interest from June 13, 1913,	3,154.68	
Frances W. Van Praag	1,115.57	
Interest from June 13, 1913,	124.57	
Marshall K. Weidensaul	1,118.27	
Interest from June 13, 1913,	124.87	722
Louis Berschman	30,815.22	
Interest from June 13, 1913,	3,441.03	
Hazan & Co.	1,247.35	
Interest from June 13, 1913,	139.30	
Yang-Tsze Ins. Assn. Ltd., *et al.*	19,737.59	
Interest from June 13, 1913,	2,204.03	
Yang-Tsze Ins. Assn. Ltd., *et al.*	74.91	
Interest from Oct. 2, 1914,	2.50	
Boston Insurance Company	9,768.93	
Interest from June 13, 1913	1,090.86	723
Federal Ins. Co., *et al.*	24,035.04	
Interest from June 13, 1913,	2,683.91	
Federal Ins. Co., *et al.*	38.50	
Interest from October 2, 1914,	1.28	
United States of America	4,998.49	
Interest from June 13, 1913,	558.17	
G. Kattan	161.37	
Interest from Feb. 2, 1912,	31.23	
J. L. de Picciotto	1,145.30	
Interest from Feb. 2, 1912,	221.55	724
A. Joseph	1,126.33	
Interest from Feb. 2, 1912,	217.88	
H. C. Bock	1,125.03	
Interest from Feb. 2, 1912,	217.63	
Walter D. Despard	14,831.24	
Interest from June 13, 1913,	1,656.15	
Roberts, Dutton & Co.	1,658.72	
Interest from Feb. 2, 1912,	320.88	

725 *Final Decree.*

Atlantic Mutual Ins. Co.	16,745.00
Interest from Feb. 2, 1912,	3,239.35
M. Dahens	522.74
Interest from Feb. 2, 1912,	101.15
H. Borday	198.69
Interest from Feb. 2, 1912,	38.45
A. Gagny	266.94
Interest from Feb. 2, 1912,	51.65
726 Gerhardt Arlt	2,000.00

Now on the subjoined admissions of correctness of the foregoing recitals and the subjoined consents and waivers of settlement in respect of the entry of this decree made by the proctors for all claimants herein, and on motion of Burlingham, Montgomery & Beecher, proctors for
727 the petitioner, it is

ORDERED, ADJUDGED AND DECREED that the collision between the steamship *Pomaron* and the steamship *Alleghany* and the various losses consequent thereon happened without the privity or knowledge of the petitioner; that the amount or value of the petitioner's interest in the steamship *Pomaron* and her pending freight is the sum of $70,419.14, and that the liability of the petitioner herein for any and all loss, damage,
728 destruction, injury or fatality arising from or growing out of the collision aforesaid and for any debts, claims or demands whatsoever arising from or growing out of the voyage of the steamship *Pomaron* upon which said collision happened, be and it hereby is limited, in accordance with Sections 4283, 4284 and 4285 of the Revised Statutes of the United States and the various acts and statutes amendatory thereof and sup-

729

plemental thereto, to the said sum of $70,419.14, and it is hereby further

ORDERED, ADJUDGED AND DECREED that the petitioner, Furness, Withy & Company, Ltd., pay or cause to be paid, into the registry of this Court the sums of $70,419.14 and $9,139.68, with interest at 6% on $70,419.14 from February 4, 1912, amounting to the sum of $13,599.57, and with interest at 2½% on $9,139.68 from October 1, 730
1913, amounting to the sum of $356.51, making an aggregate sum of $93,514.90, in full payment and settlement of all claims against it arising from said collision;

And the petitioner having paid into the registry of this Court, concurrently with the entry of this decree, the said sums of $70,419.14 and $9,139.68, with interest as above set forth, it is further

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ORDERED, ADJUDGED AND DECREED that the petitioner and its surety be and they hereby are released from all further liability under the said stipulation for value filed herein in the sum of $70,500 or otherwise by reason of any matter or thing arising from or growing out of the said collision; that any and all lien or liens or claims upon or against the steamship *Pomaron* or its owner, if such liens there be, arising from or growing out of said collision or any matter or 732
thing happening upon the voyage aforesaid be and they hereby are divested and discharged and transferred to the said fund of $70,419.14, and that all bonds, stipulations for value and stipulations for costs filed herein by the petitioner or by any party, be and they hereby are cancelled and discharged of record; and it is further

ORDERED, ADJUDGED AND DECREED that the Clerk of this Court pay, or cause to be paid, to each

participating claimant, or his proetor or proctors, his ratable share of the sums of $70,419.14 and $9,139.68 and interest as above set forth remaining in the registry after payment to the petitioner or its proctors of the proper expenses of the limitation proceeding in the sum of $140.36 and the fees and charges of the officers of this Court in the sum of $944.89, amounting in all to
734 the sum of $1085.25 in proportion to the amount of his claim as fixed and adjusted in pursuance of the agreement hereinbefore recited, on condition, nevertheless, that each claimant entitled to share in said fund, or his proctors or proctor in his behalf, execute a receipt for the sum so received, expressly discharging from liability in respect of the collision aforesaid the steamship *Pomaron,* her owners and charterers and re-
735 nouncing any and every right of action or suit other than herein against them or any of them or against the said steamship *Pomaron* in law and in admiralty in any Court of any country or jurisdiction; and it is hereby further

ORDERED, ADJUDGED AND DECREED that the default of all persons and corporations that may have sustained any loss, destruction, damage or injury arising from or growing out of the aforesaid collision or in respect of any matter or thing
736 happening on the aforesaid voyage, and who have not heretofore presented or filed claims, be and the same hereby is entered, and that all claims which have not heretofore been presented or filed in this proceeding be and they hereby are forever barred, and that the petitioner and the said steamship *Pomaron,* her engines, boilers, tackle, apparel and furniture, and her pending freight, be and they hereby are discharged from all liability in respect thereof; and it is further

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ORDERED that the claimants above named, their several agents, attorneys, proctors and counsel refrain from any further action or prosecution of proceedings taken by them in their own behalf or in behalf of others against this petitioner or against the steamship *Pomaron,* except under this decree, to recover for the losses, damages and injuries aforesaid; and it is further

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ORDERED that all persons claiming, or who may hereafter claim for any loss, destruction, damage or injury occasioned by the collision aforesaid, be and they hereby are perpetually restrained and enjoined from bringing or instituting or from prosecuting any suit or suits or proceedings in any Court of any jurisdiction or country whatever upon any cause of action against the petitioner herein or the steamship *Pomaron* for any loss, damage or injury done, 739 suffered or occasioned by reason of the loss and disaster caused by the collision aforesaid or by the sinking of the steamship *Alleghany* thereafter; and it is further

ORDERED that the service of this decree may be made within the Southern District of New York by any person of full age by delivering a copy thereof to any person or corporation to be served, its attorney or attorneys, proctor or proctors, and that it may be made in any District of the United 740 States, other than the Southern District of New York, by the United States Marshal for such District or Districts respectively by delivering a copy of such decree and exhibiting a certified copy thereof to the party, person or corporation, their attorney or attorneys, proctor or proctors.

LEARNED HAND,
Judge.

A. G., Jr.

741 *Final Decree.*

The undersigned proctors for all the parties herein hereby admit the truth of the recitals contained in the foregoing decree and consent to the entry thereof, without further notice.

CONVERS & KIRLIN,
Proctors for Yang-Tsze Insurance Association, Ltd., *et al.*

742 HARRINGTON, BIGHAM & ENGLAR,
Proctors for Walter D. Despard, *et al.*
KNEELAND, HARISON & HEWITT,
Proctors for Federal Insurance Co., *et al.*
BARRY, WAINWRIGHT, THACHER & SYMMERS,
Proctors for Walter Oloffson, *et al.*
WILLIAMS & STEVENSON,
Proctors for Boston Insurance Company.
H. SNOWDEN MARSHALL,
Proctors for United States of America.

743 BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Petitioner.
ARTHUR B. CHURCH,
Proctor for Gerhardt Arlt.

[Endorsed:]—District Court of the United States, Southern District of New York—In the Matter of the Libel and Petition of Furness, Withy & Co., Ltd., as owner of the S. S. *Pomaron* for Limitation of Liability—
744 Final Decree—Burlingham, Montgomery & Beecher, Proctors for Petitioner, 27 William Street, Borough of Manhattan, New York City—United States District Court—Filed April 22, 1915, S. D. N. Y.

Note of Issue. 745

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of The Petition of FURNESS, WITHY AND COMPANY, LTD., owner of the Steamship "POMARON", for limitation of liability.	Note of Issue. 746

Motion to vacate final decree noticed for July 1, 1915.

Dated, June 30, 1915. 747

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Petitioner.

CONVERS & KIRLIN,
HARRINGTON, BIGHAM & ENGLAR,
KNEELAND, HARISON & HEWITT,
BARRY, WAINWRIGHT, THACHER & SYMMERS,
H. SNOWDEN MARSHALL,
WILLIAM & STEVENSON,
ARTHUR B. CHURCH, 748
Protors for Claimants.

[Endorsed:]—Filed June 30, 1915.

749 *Order.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter of 750 The Petition of FURNESS, WITHY AND COMPANY, LTD., owner of the Steamship "POMARON", for limitation of its liability.	Order.

On the annexed affidavit of Norman B. Beecher, verified June 30, 1915, and sufficient cause appear-
751 ing therefor, it is

Ordered that the claimants and their proctors named below show cause before this Court, at the court rooms thereof, in the Post Office Building, Borough of Manhattan, City of New York, at 10:30 A. M. on July 1, 1915, why the final decree entered in this proceeding April 22, 1915, should not be opened and vacated, amended and corrected, and why this proceeding should not be continued until the United States Supreme Court has rendered its
752 decision on the writ of certiorari to the Circuit Court of Appeals for the Second Circuit, granted June 16, 1915, in the suit of Furness, Withy & Company, Limited, Appellant, against the Yangtsze Insurance Association, Ltd., *et al,* Appellees, and why, in the event that the Supreme Court reverses or modifies the determination of the Circuit Court of Appeals in said suit, restitution should not be decreed to the petitioner of the moneys paid

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by it under said final decree entered April 22, 1915, and why such other and further relief should not be granted as may be just, and it is

Further Ordered that service of this order and the affidavit on which it is granted on Messrs. Convers & Kirlin, proctors for the Yang-tsze Insurance Association, Ltd., Nord Deutsche Insurance Company, Union Insurance Company of Canton, Ltd., the Corporation of Lloyds and Aetna Insurance Company; on Messrs. Harrington, Bigham & Englar, proctors for Laura Moore, Eugene J. F. Coleman, Orton G. Orr, Frances W. Van Praag, Marshall K. Weidensaul, Louis Bertschman, G. Kattan, J. L. de Piccioto, A. Joseph, H. C. Bock, Walter D. Despard, Roberts Dutton & Co., M. Dahens, H. Borday, and A. Gagny; on Messrs. Williams & Stevenson, proctors for the Boston Insurance Company; on Messrs. Kneeland, Harrison & Hewitt, proctors for the Federal Insurance Company, the Sea Insurance Company, London Insurance Corporation, and Atlantic Mutual Insurance Company; on H. Snowden Marshall, Esq., proctor for the United States of America; on Messrs. Barry, Wainwright, Thacher & Symmers, proctors for N. H. Silvera, Walter Oloffson, Robert Luacas, C. Lyon Paul, and Hazen & Co.; and on Arthur B. Church, Esq., proctor for Gerhardt Arlt, on June 30, 1915, shall be good and sufficient service on said proctors and on each and all of the claimants respectively represented by said proctors.

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Dated, New York, June 30, 1915.

JULIUS M. MAYER,
District Judge.

757 *Affidavit.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

758 of

The Petition of FURNESS, WITHY AND COMPANY, LTD., owner of the Steamship "POMARON", for limitation of its liability.

STATE OF NEW YORK, } ss:
759 County of New York, }

NORMAN B. BEECHER, being duly sworn, says: I am a member of the firm of Burlingham, Montgomery & Beecher, and one of the proctors for the petitioner herein.

Fifteen suits in admiralty were brought in this Court to recover from Furness, Withy & Company, Limited, damages alleged to have been sustained by a collision between its steamship
760 *Pomaron* and the Hamburg American Line steamship *Alleghany* on February 2, 1912. Such proceedings were had in said suits that this Court on June 13, 1913, entered a decree against Furness, Withy & Company, Limited, in the sum of $172,029.81 for the loss and damage therein alleged to have been sustained.

Thereafter Furness, Withy & Company appealed to the Circuit Court of Appeals for the Second Circuit, which, on June 20, 1914, affirmed

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the decree of the District Court, with interest and costs.

The opinion of this Court and the Circuit Court of Appeals and the original decree of this Court, as well as the mandate of the Circuit Court of Appeals, and the decree entered in this Court thereon, and all other papers and proceedings in said fifteen suits, are hereby referred to and made a part hereof. The decision of the Circuit Court of Appeals is reported in 215 Fed. Rep. 859.

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On April 12, 1915, Furness, Withy & Company, Limited, applied to the Supreme Court of the United States for a writ of certiorari, which was on April 19, 1915, denied by said Court.

On October 5, 1914, Furness, Withy & Company, Limited, filed its petition in this Court to limit its liability. This petition was filed because of the aforesaid final adjudication of liability against the petitioner, and in order to protect rights which might otherwise have been defeated.

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No proceedings of consequence under this petition to limit liability were had until after the denial by the Supreme Court on April 19, 1915, of the aforesaid petition for a writ of certiorari. Thereafter, and on April 22, 1915, a final decree, which is hereby referred to and made a part hereof, was entered in this limitation proceeding, directing that the petitioner pay into the registry of this Court $93,514.90 in full payment and settlement of all claims against it arising from the aforesaid collision between the steamship *Pomaron* and the steamship *Alleghany*. The payment directed was made by the petitioner.

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The amount so directed to be paid and paid by the petitioner was on account of the claims included in and covered by the decree of this Court

765 as affirmed pursuant to the mandate of the Circuit Court of Appeals. Said final decree in this limitation proceeding was made and the payment thereunder by the petitioner was made for the reason that after the denial by the Supreme Court of its petition for a writ of certiorari the petitioner could not further contest its liability as adjudged,
766 and was bound to pay the amount paid under said final decree.

Subsequent to the making of said final decree and the payment by the petitioner of said sum of $93,514.90 thereunder, and on May 10, 1915, on information and belief, the United States Supreme court granted a writ of certiorari in the suit of Olaf Lie, master of the Norwegian steamship *Selja,* against the San Francisco & Portland Steamship Company, which, upon information and
767 belief, was a case of collision very similar in principle to the collision between the *Pomaron* and the *Alleghany.* Thereupon the petitioner renewed its application for a writ of certiorari, and on June 16, 1915, the Supreme Court granted the writ.

By virtue of the granting of the writ of certiorari the liability of the petitioner is now open to review on the merits of the Supreme Court. If the Supreme Court reverses the determination
768 of the Circuit Court of Appeals your petitioner will be entitled to restitution of the moneys paid. Under these circumstances it is necessary that the final decree entered in this limitation proceeding April 22, 1915, should be opened and vacated, amended and corrected, and that this proceeding should be continued until such time as the Supreme Court renders its decision in the proceedings under the aforesaid writ of certiorari.

Wherefore, it is respectfully prayed that an

769

order to show cause be granted, returnable July 1, 1915, directing that the claimants in this proceeding, and their proctors, show cause why the aforesaid final decree in this limitation proceeding should not be opened and vacated, amended and corrected, and this proceeding continued until the Supreme Court has rendered its decision on the writ of certiorari, and why, in the event that 770
the Supreme Court reverses the determination of the Circuit Court of Appeals, restitution of the money paid should not be decreed to the petitioner, and why such other and further relief should not be granted as may be just.

An order to show cause is requested for the reason that there is not sufficient time before July 1, to give the usual notice of motion, and it is necessary that this application should be made on that day. 771

NORMAN B. BEECHER.

Sworn to before me this }
30th day of June, 1915. }

ROSCOE H. HUPPER,
(Seal) Notary Public,
New York County, No. 1621.

[Endorsed:]—District Court of the United States, Southern District of New York — In the 772
Matter of the petition of Furness, Withy & Company, Limited, owner of the Steamship *Pomaron*, for Limitation of its Liability—Order to Show Cause and Affidavit—Burlingham, Montgomery & Beecher, Proctors for Petitioner, 27 William Street, Borough of Manhattan, New York City—Filed July 2, 1915.

See page 195

773 *Affidavit.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

774 of

The Petition of FURNESS, WITHY AND COMPANY, LTD., owner of the Steamship "POMARON", for limitation of liability.

Southern District of New York, ss.:

775 LAWRENCE KNEELAND, being duly sworn, deposes and says:

I am a member of the firm of Kneeland, Harison & Hewitt and said firm were the proctors for the Federal Insurance Company, Sea Insurance Company, Limited, London Assurance Corporation and Atlantic Mutual Insurance Company, claimants in this proceeding.

The order to show cause which is now before this Court for hearing was served upon my said
776 firm but my said firm did not sign any admission of service thereof.

After the final decree was entered in this proceeding on April 22, 1915, and on the 1st day of May, 1915, the Clerk of this Court paid to my said firm out of the moneys deposited in Court by the petition herein, the sum of $19,568.73, which was the total amount payable under the decree herein to the above named claimants,

777

and upon the 4th day of May, 1915, my said firm paid and distributed the sum so received among the above named claimants.

LAWRENCE KNEELAND.

Sworn to before me this
1st day of July, 1915.

MARTIN J. WILSON,
[SEAL] Notary Public,
Kings County, No. 169.

778

Certificate Filed in New York County, No. 181.

[Endorsed:]—United States District Court, Southern District of New York—In the Matter of the Petition of Furness, Withy & Company, Limited, owner of the Steamship *Pomaron*, for Limitation of Liability—Affidavit—Copy Received, Burlingham, Montgomery & Beecher—July 6, 1915—Filed July 2, 1915.

779

From page 193:

State of New York } ss.: G. Noyes Slayton being duly sworn
County of New York } says, that he is upwards of 21 years of age
that on the 30th day of June in the year one thousand nine hun
and fifteen, served a copy of the within order to show cause
affidavit on Conners & Kirlin at 27 William Street, Bar
Hornaught Thacher & Symmers at 59 Wall St., Harrington
Ham and Taylor at 64 Wall St., Milburn & Stevenson at 27
St., Arthur B. Church at 27 Cedar St., Kneeland Harrison
at 43 Cedar St. and H. Snowden Marshall at the P.O. Bl
all within the city of N. Y. by delivering the same to the ma
clerk at each person's office with the sole exception of Barn
Hornaught Thacher & Symmers where it was delivered to Mr. Sy

780

G. Noyes Slayton.

Sworn to before me this 30th day of June 1915—

(Seal) Roscoe H. Hupper, Notary Public N. Y. Co #13

781 *Affidavit.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

782 The Petition of FURNESS, WITHY AND COMPANY, LTD., owner of the Steamship "POMARON", for limitation of its liability.

STATE OF NEW YORK,
County of New York, } ss.:

783 D. ROGER ENGLAR, being duly sworn, deposes and says: That he is a member of the firm of Harrington, Bigham & Englar, who were formerly proctors for Laura Moore, Eugene J. F. Coleman, Orton G. Orr, Frances W. Van Praag, Marshall K. Weidensaul, Louis Bertschman, G. Kattan, J. L. de Piccioto, A. Joseph, H. C. Bock, Walter D. Despard, Roberts Dutton & Co., M. Dehans, M. Borday, and A. Gagny, claimants in the above entitled proceedings.

784 On April 22nd, 1915, a final decree was entered in the above entitled proceedings wherein, among other things, the Court ordered, adjudged and decreed that the petitioner's liability was limited in the sum of $93,514.90, and directed that the said petitioner pay the said sum of money into the registry of the Court for distribution in accordance with the terms of the said decree. It was further ordered, adjudged and decreed

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by the said final decree that the claimants above named, formerly represented by deponent's firm as proctors, be paid their *pro rata* share of the said sum of money surrendered by the petitioner in the said proceedings.

In accordance with the terms of the said decree, the said sum of $93,514.90 was paid into the registry of this Court by the said 786
petitioner and the said sum of money was distributed by the Clerk of this Court in accordance with the terms of said decree. Deponent's firm received from the Clerk of this Court the sums of money awarded to the various claimants who were represented by them as proctors at that time. The money so paid to deponent's firm, as proctors, was then paid out by them to the various persons entitled thereto, and deponent's firm was paid their fees and disbursements for 787
services rendered. The accounts of deponent's firm with the various claimants in this case have now been closed and the relation of proctor and client which formerly existed between them and various claimants in the above entitled proceeding has terminated.

The said firm of Harrington, Bigham & Englar have received no instructions or retainers from the said claimants since their accounts were 788
closed as aforesaid, and are not now authorized to act on behalf of any of the said claimants.

D. Roger Englar.

Sworn to before me this
1st day of July, 1915.

Mathilda M. Kaempffe,
[Seal] Notary Public, #1901,
New York County.

789 *Affidavit.*

[Endorsed:]—United States District Court, Southern District of New York—In the Matter of the Petition of Furness, Withy & Company, Limited, owner of the Steamship *Pomaron*, for Limitation of its Liability—Affidavit—Harrington, Bigham & Englar, 64 Wall Street, New York City—Filed July 2, 1915.

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791

792

Affidavit. 793

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of 794

The petition of FURNESS, WITHY & COMPANY, LTD., for Limitation of its Liability, as Owner of the Steamship "POMARON".

STATE OF NEW YORK,
County of New York, } ss:

L. DEGROVE POTTER, being duly sworn, says: 795

I am an attorney and managing clerk in the office of Convers & Kirlin.

The petition herein was filed on October 5, 1914, by the owner of the steamship *Pomaron* for a limitation of its liability for damages arising out of the collision of between the *Pomaron* and the *Alleghany* on February 2, 1912.

Numerous suits had been instituted against the *Pomaron* by various parties to recover dam- 796
ages resulting from the collision. Among those suits were libels filed by Convers & Kirlin as proctors for Yang-tsze Insurance Association, Limited, U. S. Lloyds, Indemnity Mutual Marine Insurance Company, Limited, Nord-Deutsche Insurance Company, Union Insurance Society of Canton, Limited, Commercial Union Assurance Company, Limited, the Corporation of Lloyds and the Aetna Insurance Company.

797 *Affidavit.*

Those libels went to final decree in which the *Pomaron* was adjudged in fault for the collision, and the various libelants were adjudged entitled to recover their damages.

The decrees were affirmed by the United States Circuit Court of Appeals and final decrees on mandate were entered on October 3, 1914. Two days thereafter, on October 5th,
798 the petition for limitation of liability was filed herein.

On January 18, 1915, claims were filed herein by Convers & Kirlin as proctors for Yang-tsze Insurance Association, Limited, U. S. Lloyds, Indemnity Mutual Marine Insurance Company, Limited, Nord-Deutsche Insurance Company, Union Insurance Society of Canton, Limited, Commercial Union Assurance Company, Limited,
799 the Corporation of Lloyds and the Aetna Insurance Company.

On April 22, 1915, a final decree was entered in these proceedings by consent, limiting the liability of the petitioner to the sum of $93,514.90. This decree directed the petitioner to pay the said sum into Court and the clerk of the Court was directed to distribute the said sum *pro rata* among the various claimants in accordance with the terms of the decree.

800 Thereafter the said sum of $93,514.90 was paid by the petitioner into the registry of the Court and was disbursed by the clerk of the Court in accordance with the terms of the decree. The proportion of the said sum that was due to the various claimants represented by Convers & Kirlin was paid to them by the clerk and by them has been paid out to their clients, less appropriate charges for fees and disbursements.

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The accounts with the said clients with repect to this transaction were then closed.

L. DEGROVE POTTER.

Sworn to before me this
2nd day of July, 1915.

M. W. MACLAY, JR.

802

[Endorsed:]—United States District Court Southern Dist. of New York—In the Matter of the Petition of Furness, Withy & Company, Ltd., for Limitation of its Liability, as Owner of the Steamship *Pomaron*—Affidavit—Convers & Kirlin, Proctors for Claimants, 27 William Street, New York, N. Y.—Filed July 2, 1915.

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804

805 *Notice of Motion.*

In the Matter
of
The Petition of FURNESS, WITHY AND COMPANY, LTD., owner of the Steamship "POMARON", for limitation of liability.

806 SIRS:

TAKE NOTICE that the within will be presented to Hon. Augustus N. Hand for settlement and signature at his chambers in the Woolworth Building, at 10 A. M., July 3, 1915.

Dated, New York, July 2, 1915.

BURLINGHAM, MONTGOMERY & BEECHER,
Attorneys for Petitioner,
Office & P. O. Address,
807 27 William Street,
New York City.

To:

MESSRS. CONVERS & KIRLIN,
Proctors for Yang-Tsze
Insurance Association, *et al.*,
MESSRS. HARRINGTON, BIGHAM AND ENGLAR,
Proctors for Laura Moore, *et al.*,
MESSRS. WILLIAM AND STEVENSON,
Proctors Boston Insurance Company,
808 MESSRS. KNEELAND, HARRISON & HEWITT,
Proctors for Federal Insurance Company, *et al.*,
H. SNOWDEN MARSHALL, ESQ.,
Proctor for the United States of America,
MESSRS. BARRY, WAINRIGHT, THACHER & SYMMERS,
Proctors for M. H. Silvera, *et al.*,
ARTHUR B. CHURCH, ESQ.,
Proctor for Gerhardt Arlt.

Order. 809

At a Stated Term of the United States District Court for the Southern District of New York, held at the Court Rooms in the Woolworth Building, Borough of Manhattan, City of New York, on the 3rd day of July, 1915.

Present—Hon. AUGUSTUS N. HAND, 810
District Judge.

In the Matter

of

The Petition of FURNESS, WITHY AND COMPANY, LTD., owner of the Steamship "POMARON", for limitation of liability. 811

The petitioner, Furness, Withy & Company, Limited, having moved that the final decree entered in this proceeding April 22, 1915, be opened and vacated, amended and corrected, and that this proceeding be continued until the United States Supreme Court has rendered its 812 decision on the writ of certiorari to the Circuit Court of Appeals for the Second Circuit, granted June 16, 1915, in the suit of Furness, Withy & Company, Ltd., appellants against the Yangtsze Insurance Comyany, Ltd., *et al.*, appellees, and that in the event that the Supreme Court reverses or modifies the determination of the Circuit Court of Appeals in said suit, restitution

be decreed to the petitioner of the moneys paid by it under said final decree entered April 22, 1915, and that such other and further relief be granted as may be just;

And said motion having duly come on to be heard on July 1, 1915, on the order to show cause dated June 30, 1915, and having been duly adjourned in open court to July 2, 1915, at 2 o'clock P. M. and having been further adjourned until July 3, 1915, at 10 o'clock, A. M., and it appearing that said order to show cause was duly served on the proctors named therein, and that said motion was made within the term at which the final decree entered April 22, 1915, was entered as extended by the rules of this Court,

Now, on reading and filing the order to show cause dated June 30, 1915, and the affidavit of Norman B. Beecher, verified June 30, 1915, in support of the motion, and the affidavits of Lawrence Kneeland and D. Roger Englar, verified July 1, 1915, and of L. de Grove Potter, verified July 2, 1915, in opposition thereto, and on all the proceedings herein, it is

ORDERED that no decision be made on the question of the sufficiency of the service herein or the merits of this motion at the present time, nor until the United States Supreme Court shall have rendered its decision on the aforesaid writ of certiorari to the Circuit Court of Appeals for the Second Circuit, granted June 16, 1915, and that the term of this Court for all purposes of the relief sought by the petitioner herein be and it hereby is extended until the aforesaid decision of the United States Supreme Court and until appropriate action thereunder by the

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Circuit Court of Appeals and by this Court, and it is further

ORDERED that the said motion be and the same hereby is continued until the further order of this Court.

AUGUSTUS N. HAND,
D. J.

818

[Endorsed:]—United States District Court, Southern District of New York—In the Matter of The Petition of Furness, Withy & Company, Limited, owner of the steamship *Pomaron*, for Limitation of Liability—Order—Burlingham, Montgomery & Beecher, Attorneys for Petitioner, 27 William Street, Borough of Manhattan, New York City—Filed July 3, 1915.

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821 *Clerk's Certificate.*

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

In the Matter
of
822 The Petition of FURNESS, WITHY & COMPANY, Limited, for Limitation of Liability as owners of the steamship "POMARON."

I, ALEXANDER GILCHRIST, JR., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript
823 of the record of the said District Court in the above entitled matter, pages 14, 15, 25, 26, 27, 147 and 206 not being certified because they are duplicates of pages here

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto amxed, at the City of New York, in the Southern District of New York, this 9th day of December, in the year of our Lord one thousand nine hundred and sixteen —and of the Independence of the said United States the one hundred and ~~thirty~~ .
824

Alexander Gilchrist, Jr.,
Clerk.

Seal.

they certified or not included in the Record.

[redacted]

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

FURNESS, WITHY & COMPANY, LIMITED, Respondent-Appellant, Petitioner,	
AGAINST	No. 106.
YANG-TSZE INSURANCE ASSOCIATION, LIMITED, and others, Libellants-Appellees, Respondents.	

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

The above entitled case is now before this Court on a writ of certiorari directed to the Circuit Court of Appeals for the Second Circuit. The petitioner, Furness, Withy & Company, Limited, seeks to review in this Court a decision of the United States Circuit Court of Appeals for the Second Circuit affirming decrees in favor of various libellants in actions brought against the said Furness, Withy & Company, Limited, as owner of the steamship *Pomaron*, which collided with and sank the steamship *Alleghany* outside the Virginia Capes on February 2nd, 1912. The libellants were owners of or underwriters on cargo which was on board and lost with the steamship *Alleghany*.

The United States District Court for the Southern District of New York and the United States

Circuit Court of Appeals for the Second Circuit held that both steamers were at fault for the collision and that the libellants were, therefore, entitled to recover from the present petitioner, Furness, Withy & Company, Limited, the amount of their respective claims.

The purpose of the present motion is to bring to the notice of the Court the fact that there remains no substantial controversy between the parties to the above entitled proceeding; that all of the issues between the parties have been settled and compromised; and that, if this Court proceeds to decide the above proceeding on the merits, it will merely have decided a moot case.

This Court has repeatedly decided that it will not pass upon questions which involve no substantial controversy between the parties; and the fact that a case involves only a moot question may be shown by evidence outside the record, and at any stage of the proceeding—even after argument on the merits.

Dakota County v. *Glidden*, 113 U. S., 222.
Elwell v. *Fosdick*, 134 U. S., 500.
Little v. *Bowers*, 134 U. S., 547.
Mills v. *Green*, 159 U. S., 651.
Codlin v. *Kohlhausen*, 181 U. S., 151.
American Book Co. v. *Kansas*, 193 U. S., 49.
Jones v. *Montague*, 194 U. S., 147.
Hooker v. *Burr*, 194 U. S., 415, 419.
Security Life Ins. Co. v. *Prewitt*, 200 U. S., 446.
Fisher v. *Baker*, 203 U. S., 174, 181.
Buck's Stove & Range Co. v. *American Federation of Labor*, 219 U. S., 581.
United States v. *Hamburg American, etc. Co.*, 239 U. S., 466.

Accordingly, if the issues between the parties in the present case have been compromised and settled, the writ of certiorari should be dismissed or the judgment of the Circuit Court of Appeals should be affirmed.

Three days after judgment had been entered in the United States District Court for the Southern District of New York on the mandate of the Circuit Court of Appeals, and before any proceedings for execution under the judgment were had, or any moneys were paid to the libellants in pursuance of said judgment, Furness, Withy & Company, Limited, respondent below and petitioner here, filed in the said United States District Court for the Southern District of New York a petition for a limitation of its liability as owner of the said steamship *Pomaron*.

This petition was filed on October 5th, 1914.

The usual monition and injunction issued out of the District Court, and the final decree on mandate was thereby stayed and became wholly inoperative for the purpose of enforcing payment; and no payment was, in fact, made at any time under the said judgment.

Thereafter the petitioner, Furness, Withy & Company, Limited, applied to this Court for a writ of certiorari to review the decision of the said United States Circuit Court of Appeals—which writ was denied by this Court on April 19th, 1915 (238 U. S. 625).

In the meanwhile claims had been filed in the limitation proceedings, not only by the claimants who had appeared as libellants and had obtained judgments in the previous actions in the District Court, but also by a number of other persons who had filed no libels and had taken no part in the previous proceedings.

On April 22nd, 1915, pursuant to a detailed

agreement of settlement and compromise between all the parties to the limitation proceedings, a decree was entered in those proceedings, which recites on its face that it is entered pursuant to an agreement whereby *"the petitioner and all the claimants herein have compromised and settled the issues between them."*

(The Limitation Record, p. 179).

The respondents submit herewith a certified copy of the entire record in the limitation proceedings which, when taken in connection with the record of the original proceedings in the District Court and the Circuit Court of Appeals, establishes every fact material to the question presented by this motion.

A more detailed statement of the material facts is contained in the affidavit of John M. Woolsey, Esq., verified the ninth day of December, 1916, which is herewith submitted.

As the final decree in the limitation proceedings lies at the foundation of the present motion, we quote the following material portions of that decree:

> "Whereas the petitioner and all the claimants herein have compromised and settled the issues between them, and in consideration of the said compromise and settlement it has been agreed between the petitioner and all the claimants:
>
> "1. That the amount or value of the petitioner's interest in the steamship *Pomaron* and her freight as of the date of her return to Newport News on February 4, 1912, after the collision, was and it is $70,419.14; and
>
> "2. That the exceptions filed to the provisional valuation herein are waived; and

"3. That the collision aforesaid and the losses, injuries and damages consequent thereon occurred without the petitioner's privity or knowledge; and

"4. That the surety on petitioner's stipulation for value shall be and is exonerated from any and all liability in excess of the said $70,419.14 and interest by reason of any matter growing out of said collision; and

"5. That the petitioner shall be and is exonerated from any and all liability in excess of said $70,419.14 with interest thereon at 6% from February 4, 1912, amounting to $13,599.57, plus the additional amount of $9,139.68, with interest thereon, at 2½% from October 1, 1913, amounting to $356.51, the latter amount being the amount received on October 1, 1913, from the owners of the steamship *Alleghany* as directed by the final decree of this Court entered September 26, 1913, in the matter of the libel and petition of the Hamburg-American Line, owner of the steamship *Alleghany* for limitation of liability; and

"6. That on the payment into Court or to the claimants by the petitioner, of the sums of $70,419.14, with interest amounting to $13,599.57 and $9,139.68, with interest amounting to $356.51, as set forth in paragraph numbered 5 above, making an aggregate sum of $93,514.90, all bonds and stipulations for value and costs given by the petitioner for the payment into Court of any sum or sums of money representing the petitioner's interest in the steamship *Pomaron* and freight moneys, or for costs in this proceeding, shall be deemed to have been fulfilled and satis-

fied, and shall be forthwith, without further consent or notice, cancelled and discharged of record by order of the Court; and

"WHEREAS in consideration of the said compromise and settlement, the several claimants herein by agreement have fixed and adjusted the amounts of their several losses consequent on the said collection at the following sums, to wit:

* * * * *

"Now on the subjoined admissions of correctness of the foregoing recitals and the subjoined consents and waivers of settlement in respect of the entry of this decree made by the proctors for all claimants herein, and on motion of Burlingham, Montgomery & Beecher, proctors for the petitioner, it is

ORDERED, ADJUDGED AND DECREED that the collision between the steamship *Pomaron* and the steamship *Alleghany* and the various losses consequent thereon happened without the privity or knowledge of the petitioner; that the amount or value of the petitioner's interest in the steamship *Pomaron* and her pending freight is the sum of $70,419.14, and that the liability of the petitioner herein for any and all loss, damage, destruction, injury or fatality arising from or growing out of the collision aforesaid and for any debts, claims or demands whatsoever arising from or growing out of the voyage of the steamship *Pomaron* upon which said collision happened, be and it hereby is limited, in accordance with Sections 4283, 4284 and 4285 of the Revised Statutes of the United States and the various acts and statutes amendatory thereof and supplemental thereto, to the said sum of $70,419.14, and it is hereby further

"ORDERED, ADJUDGED AND DECREED that the petitioner, Furness, Withy & Company, Ltd., pay or cause to be paid, into the registry of this Court the sums of $70,419.14 and $9,-139.68, with interest at 6% on $70,419.14 from February 4, 1912, amounting to the sum of $13,599.51, and with interest at 2½% on $9,-139.68 from October 1, 1913, amounting to the sum of $356.51, making an aggregate sum of $93,514.90, in full payment and settlement of all claims against it arising from said collision;

"And the petitioner having paid into the registry of this Court, concurrently with the entry of this decree, the said sums of $70,-419.14 and $9,139.68, with interest as above set forth, it is further

"ORDERED, ADJUDGED AND DECREED that the petitioner and its surety be and they hereby are released from all further liability under the said stipulation for value filed herein in the sum of $70,500 or otherwise by reason of any matter or thing arising from or growing out of the said collision; * * * * * and it is further

"ORDERED, ADJUDGED AND DECREED that the Clerk of this Court pay, or cause to be paid, to each participating claimant, or his proctor or proctors, his ratable share of the sums of $70,419.14 and $9,139.68 and interest as above set forth remaining in the registry after payment to the petitioner or its proctors of the proper expenses of the limitation proceeding in the sum of $140.36 and the fees and charges of the officers of this Court in the sum of $944.89, amounting in all to the sum of $1,085.25 in proportion to the amount of his claim as fixed and adjusted in pursuance of

> the agreement hereinbefore recited, on condition, nevertheless, that each claimant entitled to share in said fund, or his proctors or proctor in his behalf, execute a receipt for the sum so received, expressly discharging from liability in respect of the collision aforesaid the steamship *Pomaron,* her owners and charterers and renouncing any and every right of action or suit other than herein against them or any of them or against the said steamship *Pomaron* in law and in admiralty in any Court of any country or jurisdiction; * * *" (Limitation Record, pages 179-184).

* * * * * * *

The Court's attention is called particularly to the following circumstances in connection with the limitation proceedings:

(I) Neither the petition nor the final decree makes the slightest reference to the previous proceedings in the District Court and Circuit Court of Appeals; or to the decisions of those Courts.

(II) The petitioner did not admit liability, but, on the contrary, alleged in the petition that the collision was "due solely to the negligence of the steamship *Alleghany* and those in charge of her" (Limitation Record, page 3); and expressly stated that "the petitioner desires to contest its liability as owner of the steamship *Pomaron* for the loss, destruction, damage and injury occasioned or incurred by the collision with the said steamship *Alleghany* (independently of the limitation of liability hereinafter claimed)" (Limitation Record, page 5).

(III) No appraisal of the petitioner's interest in the steamer *Pomaron* or her pending freight was actually had; but, on the contrary, the claim-

ants accepted, as a part of the compromise, the values placed upon these interests by the petitioner's own agent, Millican. (Limitation Record, pages 10-12, 179.)

(IV.) The amounts of the several claims were not fixed by a reference or by order of the Court, but were the subject of compromise and agreement among the various claimants. (Limitation Record, p. 186.)

(V) No evidence was taken in the limitation proceedings to establish either the value of the steamer *Pomaron,* or the absence of privity or knowledge on the part of the petitioner.

(VI) A number of the claimants in the limitation proceedings, who consented to the final decree, were not parties to the original proceedings wherein the steamer *Pomaron* had been found at fault; and they were in no way bound by such proceedings. (Compare list of libellants, on pages 160 to 162 of transcript of record in this case, with Commissioner's Report giving list of claimants, on pages 57 to 59 of Limitation Record annexed to Motion.)

(VII) The final decree in the limitation proceedings was entered on motion of the proctors for the petitioner, Furness, Withy & Company, Limited. (Limitation Record, p. 182.)

(VIII) The final decree in the limitation proceedings required the claimants to give a receipt expressly discharging not only the steamship *Pomaron* and the petitioner, Furness, Withy & Company, but also the charterers of the said steamer; and renouncing all rights which they might have against the said steamer "in any

Court of any country or jurisdiction." (Limitation Record, p. 184.)

(IX) The agreement embodied in the said final decree has been actually carried out and the money therein provided to be paid has been paid over to the various claimants or their proctors. (Limitation Record, pages 194 to 201.)

It would be difficult to frame a more solemn and binding agreement of settlement and compromise than that recited in the final decree in the limitation proceedings. If that agreement had been carried out among the parties without the entry of any judgment, it would scarcely be suggested that it could be reopened or set aside for any cause, short of fraud. As a matter of fact, the only reason for entering a judgment was to give the petitioner the benefit of an injunction against any further or other claims.

It has generally been supposed that the best method of putting a compromise into effect and making it absolutely final is to have judgment entered upon it pursuant to the agreement of the parties. It has never been suggested, so far as respondents' counsel are aware, that an agreement of settlement and compromise loses any of its binding force and effect because it is made the judgment of a Court of competent jurisdiction. It is submitted that no authority can be found for avoiding or vacating either the agreement of the parties to the limitation proceedings above mentioned, or the judgment entered pursuant thereto. On the contrary, there is abundant authority for the proposition that this agreement and judgment are final as to all the issues mentioned therein.

In the case of *Nashville, Chattanooga and St.*

Louis Railway Company v. *United States* (113 U. S. 261), this Court had before it a question very similar to the question presented on this motion. In that case a petition had been filed in the Court of Claims to recover compensation for carrying the United States mails during the Civil War. In that proceeding it appeared that in 1871 a bill in equity had been filed by the United States against the aforesaid railway company to enforce certain demands of the United States against said company. In the equity proceeding the railway company had not set up as a set-off or cross action any demand for the transportation of mails; nor was any such claim mentioned in the negotiations which led up to the entry of the final decree. The equity proceedings were compromised and a final decree was entered by consent of the parties which recited the compromise and related that it was entered

> "in consideration of the settlement, satisfaction and discharge of all mutual claims and accounts between the parties as they existed on the first day of June, 1871."

In view of this decree, the Court of Claims dismissed the petition and an appeal was taken to this Court. The judgment of the Court of Claims was affirmed. Mr. Justice Gray, in delivering the opinion of this Court said:

> "But the insurmountable difficulty is, that the former decree appears upon its face to have been rendered by consent of the parties, and could not therefore be reversed, even on appeal. Courts of chancery generally hold that from a decree by consent no appeal lies. 2 Dan. Ch. Pr. ch. 32, sec. 1; French *v.* Shotwell, 5 Johns, Ch. 555; Win-

> chester *v.* Winchester, 121 Mass., 127. Although that rule has not prevailed in this court under the terms of the Acts of Congress regulating its appellate jurisdiction, yet a decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause. A *fortiori,* neither party can deny its effect as a bar of a subsequent suit on any claim included in the decree."
>
> * * *

It is believed that the decision in that case is conclusive on the issue presented by this motion.

Many authorities may be cited to the same effect.

In *Clark* v. *Charles,* (55 Nebraska, 202), an action was brought to quiet title to certain real estate. A decree was entered which recited that it was entered in accordance with the stipulation and agreement of all parties to the action. Motions were later made to modify the decree and these motions were sustained by the trial court. This decision was reversed by the Supreme Court of Nebraska, which said:

> "The record before us will not sustain the finding that this decree was procured by fraud practiced by any one, nor that the decree is the result of a mistake, neglect, or omission of the clerk of the court."

It was argued that the decree was void because not warranted by the pleadings filed, but the Supreme Court said:

> "We think the answer to this argument is that this decree does not depend for its support entirely upon the pleadings filed in the Clark-Charles suit, but is the result of the

solemn agreement and stipulation of the parties in open court."

In *Fletcher* v. *Holmes* (25 Ind. 458), the Supreme Court of Indiana had to determine the validity of a judgment rendered in foreclosure proceedings. The judgment in question provided that if the proceeds of the mortgaged property were insufficient to pay the amount of the debt secured by the mortgage, the amount remaining unpaid should be collected out of the other property of the mortgagor. It was conceded that the personal judgment was unwarranted by the pleadings and, indeed, by the facts, as the mortgagor had not agreed to pay the money secured by the mortgage; but the judgment was nevertheless upheld on the ground that it was rendered by consent. The Court said:

"We can conceive of no reason why a judgment entered by agreement, by a court of general jurisdiction, having power in a proper case to render such a judgment, and having the parties before it, should not bind those by whose agreement it is entered, notwithstanding the pleadings would not, in a contested case, authorize such a judgment."

In *Indianapolis, etc. Railway Company* v. *Sands, et al,* (133 Ind. 433), the Supreme Court of Indiana laid down the same rule in the strongest terms, saying:

"The presumption is that the Court would have rendered a legal and valid judgment within the issues in the case; but here is a case presented where it is shown that the court yielded to the request of the parties and rendered such a judgment in manner and form as the parties agreed to, and now one of them is asking to be relieved from an error

which it made in its agreement and induced the court to acquiesce in".

In the case of *Walsh* v. *Walsh* (116 Mass. 377), the Supreme Judicial Court of Massachusetts said:

> "If the court does pronounce a decree against an infant by consent, and without inquiry whether it will be for his benefit, he is as much bound by the decree as if there had been a reference to a master and a report by him that it was for the benefit of the infant. Wall v. Bushby, 1 Bro. Ch. 484. 1 Dan. Ch. Pr. 164. The case falls within the general rule that a decree made by consent of counsel, without fraud or collusion, cannot be set aside by a rehearing, appeal or review. Webb v. Webb, 3 Swanst. 658. Harrison v. Rumsey, 2 Ves. Sen. 488. Bradish v. Gee, Ambl. 229; S. C. 1 Keny. 73. Downing v. Cage, 1 Eq. Cas. Ab. 165. Toder v. Sansam, 1 Bro. P. C. (2d ed.) 468. French v. Shotwell, 5 Johns. Ch. 555".

In *Prince* v. *McLemore* (108 Va. 269), the Supreme Court of Virginia said:

> "So it is said in Daniels' Chancery Prac. (4th ed.) at p. 973, 'a decree or order, made by consent of the counsel for the parties, cannot be set aside, either by re-hearing or appeal, or by bill of review, unless, by clerical error, anything has been inserted in the order, as by consent, to which the party had not consented; in which case a bill of review might lie. If, however, the decree has been obtained by fraud, relief may be had against it by original bill'. And this we understand to be the accepted doctrine upon the subject."

In the case of *Adler, et al,* v. *Van Kirk, etc.* (114 Ala., 551), the Supreme Court of Alabama said:

> "The fact that the decree in the foreclosure suit was rendered by consent of parties does not, therefore, detract from its dignity, or lessen its conclusiveness, as an adjudication between the parties. Not only is such its effect, but its consent is a waiver of error, precluding a review of the decree upon appeal, and, as a general rule, upon a bill of review.—Thompson *v.* Maxwell, 95 U. S., 391; Nashville, etc., R. R. Co. *v.* United States, 113 U. S., 266; 2 Dan. Ch. Pl. & Pr. (5th Am. ed.), p. 1576; Dunman *v.* Hartwell, 60 Am., Dec., 176; Curry *v.* Peebles, 83 Ala., 227."

In *United States Const. Co.* v. *Armour Packing Co., et al.* (35 Okla., 177), the Supreme Court of Oklahoma sustained the decision of the lower court in denying a motion to set aside a judgment entered by consent, saying:

> "The judgment in this case was the final ascertainment of the rights by consent of the parties to the suit, and cannot be changed by any subsequent order of the court without like consent." (Citing cases.)

In *Knobloch* v. *Mueller* (123 Ill., 554), the Supreme Court of Illinois said:

> "Decrees of courts of chancery, in respect of matters within their jurisdiction, are as binding and conclusive upon the parties and their privies as are judgments at law; and a decree by consent, in an amicable suit, has been held to have an additional claim to be

considered final. (Alleson *v.* Stark, 9 A. & E., 225.) Decrees so entered by consent cannot be reversed, set aside or impeached by bill of review or bill in the nature of a bill of review, except for fraud, unless it be shown that the consent was not, in fact, given, or something was inserted as by consent that was not consented to." (Citing numerous cases.)

In *Morris* v. *Peyton* (29 West Va., 201), the Supreme Court of Appeals of West Virginia had occasion to consider the effect of a consent-decree. In the course of its opinion the court said of the decree before it:

"Treating it as a consent-decree what control over it had the court below or has this Court?

"First—As such decree is not the judgment of the court upon the merits of the case but the act of the parties to the suit, it is obvious, that it cannot be modified, set aside or annulled by any order in the cause made by the court below without the consent of all the parties to the cause, unless set aside during the same term of the court, which would leave matters in the same condition as if it had never been entered. Nor can it be appealed from, nor modified by this Court, unless perhaps, it should be so entirely foreign to the matters in controversy in the cause, that for this or some other reason the court below had no jurisdiction or authority to enter any such decree by consent or otherwise. (Manion *v.* Fahy, 11 W. Va., 482, pt. 2 of Syll.) As shown in that case, it makes no difference, that such consent-decree was procured by

> fraud; or that through a mistake of the parties the decree as entered was different from what they intended it to be. In such case the party injured by such fraud or mistake can have such consent-decree set aside or modified by an original bill; but it can never be set aside by any order of the court in the cause after the end of the term, in which it was entered; nor can it *during the term or afterwards* be modified except by consent."

In Freeman on Judgments (4th ed., Sec. 330), the rule is stated as follows:

> "Irrespective of its effect as *res judicata,* a judgment by consent is regarded as in the nature of a contract or binding obligation between the parties thereto, which neither, in the absence of fraud or mistake, has the right to set aside or disregard, and which as against each is a waiver of errors or irregularities; and when such consent judgment embraces matters or extends to relief not involved within nor responsive to the issues in the case, it, with respect to such matters and relief, no doubt partakes more of the character of a voluntary agreement between the parties than of a judgment of the court determining a controversy between real litigants."

In the foregoing discussion no distinction has been made between cases in which judgments were entered merely on consent, and cases where the judgment purports on its face to be entered pursuant to an agreement of compromise and settlement. It is submitted, however, that there is a real and vital distinction between the two classes of cases.

Where a judgment has been entered on the

mere consent of a defendant, the judgment remains the act of the Court and, during the term, the judgment may perhaps be regarded as within the control of the Court and subject to be vacated or set aside, upon proof that the consent was based upon fraud or mistake.

Even in such a case, however, it is obvious that the mistake must relate to something other than the legal rights of the parties in the litigation terminated by the judgment. If this were not so, there would be no element of finality in a judgment by consent, as either party, upon changing his mind as to the merits of his claim or defense, could always ask the Court to set the judgment aside and determine the actual rights of the parties.

The purpose of settlement is to avoid or terminate litigation, and after actions are finally compromised neither party is at liberty to withdraw from the compromise merely because he has come to the conclusion that his chances of success were better than he had previously supposed.

A judgment by consent will not be set aside on the ground that the consent was given on the erroneous advice of counsel. See *Anderson* v. *Carr, et al.*, (7 N. Y. Supp. 281), a decision of the General Term of the Supreme Court of New York, Second Department, in which the opinion was written by Mr. Justice Edgar M. Cullen, later Chief Judge of the Court of Appeals of New York.

See also

Montgomery v. *Ellis* (6 Howard's Practice Reports [N. Y.], 326).

In the case of a judgment entered pursuant to an agreement of compromise, however, the situation is entirely different. In such a case

the rights of the parties are fixed primarily by their own agreement, and the decree of the court is merely the instrument whereby their agreement is carried into effect. Where a decree has been entered under such circumstances, and particularly where it has been finally carried out by the parties pursuant to their agreement, the Court, although it may theoretically have the power to set aside its decree, cannot set aside the agreement of the parties nor recall the acts done by the parties pursuant thereto. As hereinbefore suggested, an agreement of compromise duly made and carried out becomes none the less final and effective because a decree of the court was entered as a part of such agreement. In a case like the present, the settlement is not made pursuant to the decree; but the decree is made pursuant to the settlement. In effect, the parties have consented that the court may decree specific performance of their compromise agreement.

If there were any lack of finality in the decree itself, however, surely the payment and satisfaction of the various claims, pursuant to the agreement of the parties, should put an end to any further litigation in the premises. The situation in the present case is very closely analogous to the situation which was presented to this Court in the case of *Dakota County* v. *Glidden* (113 U. S. 222). In that case the statement of facts is as follows:

> "This was a motion to dismiss. The suit was on county bonds, issued in aid of a railroad. Judgment below for the plaintiff. The defendant brought a writ of error to reverse it. Subsequently to the judgment, the county settled with the plaintiff and other bondholders, by giving them new bonds

bearing a less rate of interest, and the old bonds, which were the cause of action in this suit, were surrendered and destroyed. These facts were brought before this court by affidavits and transcripts from the county records, accompanied by a motion to dismiss the writ of error."

In delivering the opinion of this Court, Mr. Justice Miller said (pages 224, 225):

"There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money. And a defendant in an action of ejectment may bring a writ of error, and failing to give a supersedeas bond, may submit to the judgment by giving possession of the land, which he can recover if he reverses the judgment by means of a writ of restitution. In both these cases the defendant has merely submitted to perform the judgment of the court, and has not thereby lost his right to seek a reversal of that judgment by writ of error or appeal. And so if, in the present case, the county had paid the judgment in money, or had levied a tax to raise the money or had, in any other way satisfied that judgment without changing the rights of the parties in any other respect, its right to prosecute this writ of error would have remained unaffected.

"But what was done was a very different thing from that.

"A new agreement, on sufficient consideration, was made, by which the judgment itself, the coupons on which it was recovered, and

the bonds of which these coupons were a part, were all surrendered and destroyed, and other bonds and other coupons were accepted in their place, payable at a more distant date and with a lower rate of interest, with the effect of extinguishing the judgment now sought to be reversed, so that the plaintiff in that judgment could not issue execution on it, though there is no supersedeas bond, to secure its payment.

"It is a valid compromise and settlement of a much larger claim, but it includes this judgment necessarily. It *extinguishes* the cause of action in this case. If valid, it is a bar to any prosecution of the suit in the Circuit Court, though we should reverse this judgment on the record as it stands for errors which may be found in it. To examine these errors and reverse the judgment is a fruitless proceeding because when the plaintiff has secured his object the relation of the parties is unchanged, and must stand or fall on the terms of the compromise.

"It is said that to recognize this compromise and grant this motion is to assume original instead of appellate jurisdiction.

"But this court is compelled, as all courts are, to receive evidence *dehors* the record affecting their proceeding in a case before them on error or appeal."

The rule deducible from all the authorities appears to be that the test of the right to restitution is whether the payment was made by the defendant *in invitum*, under compulsion of the process of the Court; or was made voluntarily. Voluntary payments, particularly if made for good consideration, cannot be recovered back,

even though it later appear that the defendant was not legally bound to make any payment.

In the present case, the settlement of the limitation proceedings had all of the elements of a mutual compromise. The petitioner was not compelled to establish the value of its interest in the *Pomaron* and her pending freight; but, as a part of the agreement, was allowed to surrender the amounts which had been fixed by its own employees.

The petitioner was not forced to establish its right to a limitation (which had not been conceded by most of the claimants) but was allowed to limit its liability by consent; and the libellants in the previous proceedings voluntarily accepted much less than the amounts of their respective judgments.

The claimants discharged the petitioner not only from claims which they had under the laws of the United States, but also from all claims which they might have put forward in other countries—notably in England, the country of petitioner's domicile.

Moreover, there was a real compromise among the claimants themselves. The fixing of their claims before a Commissioner would have been a long, tedious and expensive process. Accordingly, mutual concessions were made and the fund available was distributed in accordance with the agreement of the various claimants.

Furthermore, the result of the compromise was to preclude the participation of any other claimants (of whom there may be many) who had not filed claims in the limitation proceedings and who were, therefore, barred by the final decree.

In the light of the foregoing considerations, it seems clear that the rights which accrued under

the compromise in the limitation proceedings can never be re-adjusted in any other proceeding; and that Judge Hand's order continuing the limitation proceedings was an order which he had no jurisdiction to make on the facts presented to him. It is submitted that no court can set aside or modify the decree in the limitation proceedings whereby all of the parties themselves voluntarily adjusted their respective rights and claims and finally (as all of them believed and desired) terminated, as among themselves, all issues arising out of the collision between the *Alleghany* and the *Pomaron*.

Accordingly, even if this Court should reverse the decree of the Circuit Court of Appeals for the Second Circuit, the final decree in the limitation proceedings could not properly be vacated or set aside; and even if this decree were vacated there is no theory upon which the petitioner could recover back the money which it has voluntarily paid into court and which, on the petitioner's own motion, the court has distributed to the various claimants in the limitation proceedings. It follows that the questions now presented to this Court on *certiorari* are moot questions, which counsel should not be called upon to argue, and which this Court, under its well settled practice, will not decide.

Respectfully submitted,

J. Parker Kirlin,
Lawrence Kneeland,
D. Roger Englar,
John M. Woolsey,
Of counsel for various respondents in the above entitled proceeding.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1916

No. 106

FURNESS, WITHY & COMPANY, LIMITED
(Respondent-Appellant)
Petitioner

vs.

YANG-TSZE INSURANCE ASSOCIATION, LIMITED, *et al.*
(Libellants-Appellees)
Respondents

Affidavit in opposition to motion to dismiss or affirm

SOUTHERN DISTRICT OF NEW YORK, City and County of New York, } ss.:

CHARLES C. BURLINGHAM, being duly sworn, says:

I am a member of the firm of Burlingham, Montgomery & Beecher, proctors for the petitioner herein, and am familiar with this litigation in all its phases. I have read the affidavit of Mr. John M. Woolsey, verified December 9, 1916, on which the motion to dismiss or affirm is based. Mr. Woolsey's affidavit gives the impression that the decree entered in the limitation proceeding April 22, 1915, was based on a compromise and settlement of undetermined issues. This is not the fact. There were no issues between the petitioner and these respond-

ents in the limitation proceeding, and the payment made under the decree of April 22, 1915, was in reality made under the compulsion of the decisions of the District Court and the Circuit Court of Appeals in the collision case, as appears from the facts and circumstances hereinafter set forth. The following is a chronological statement of the history of the litigation:

February 27, 1912 -April 23, 1913,	Fifteen libels in *personam* filed in the District Court for the Southern District of New York against Furness, Withy & Co., Ltd., owner of S. S. *Pomaron* claiming in all about $220,000.
February 29, 1912,	Stipulation for value of National Surety Company in the sum of $70,500., filed by Furness, Withy & Co., Ltd., as security for claims under libels then filed and claims of "all other persons having any claims" against the steamship *Pomaron* and her owners.
March 26, 1913,	Decision rendered by District Court in favor of libellants and against petitioner.
June 13, 1913,	Decree of District Court entered for $172,089.21, with interest and costs.
June 10, 1914,	Decision of District Court affirmed by Circuit Court of Appeals.
October 2, 1914,	Decree entered in District Court on mandate of Circuit Court of Appeals.
October 5, 1914,	Petition for limitation of liability filed by Furness, Withy & Co., Ltd.
October 8, 1914,	Order of provisional valuation entered fixing value of S. S. *Pomaron* and pending freight at $70,419.14.
January 18, 1915,	Monition in limitation proceeding returned.

April 12, 1915,	First application made by Furness, Withy & Co., Ltd., for writ of *certiorari*.
April 19, 1915,	*Certiorari* denied, 238 U. S. 625.
April 22, 1915,	Final decree entered in limitation proceeding.
May 10, 1915,	*Certiorari* to Circuit Court of Appeals for 9th Circuit in suit of *Olaf Lie* v. *San Francisco & Portland S. S. Co.* granted.
June 1, 1915,	Second application made by Furness, Withy & Co., Ltd., for writ of *certiorari*.
June 14, 1915,	*Certiorari* granted, 238 U. S. 634.
July 1, 1915,	Motion made in District Court by Furness, Withy & Co., Ltd., within term at which decree of April 22, 1915, was entered, to open, vacate, amend and correct said decree, and to extend term.
July 3, 1915,	Order entered that no decision be made on merits of motion until after decision of this Court on writ of *certiorari* and extending term and continuing motion.

The denial of the petitioner's application for a writ of *certiorari* seemed definitely to foreclose further efforts to avoid the liability which had been adjudged against it by the District Court and the Circuit Court of Appeals in the collision case and the limitation decree was entered and the limitation fund paid into Court for that reason. The granting of the writ of *certiorari* in *Olaf Lie* v. *San Francisco & Portland Steamship Co.*, No. 110 of the present term, a case involving somewhat the same question as that decided adversely to the petitioner in the case at bar, justified a second application for the writ of *certiorari* by this petitioner. In its second application this petitioner stated that it had instituted

proceedings for limitation of liability which had been prosecuted to a decree since the first application was denied, under which payments had been made under compulsion.

1. The original fifteen libels were filed *in personam* against Furness, Withy & Company, Ltd., with clause of foreign attachment and laid the damages in the aggregate sum of about $220,000. From the beginning it was understood by all parties that the liability of the petitioner should not exceed the value of the *Pomaron* and her pending freight, and by consent a stipulation for value in the sum of $70,500. was filed by the petitioner in the collision case on February 29, 1912. This stipulation was, in terms, given as security for [illegible] laims of the libellants who had already filed libe[illegible]laims of "all other persons having any claim[illegible] e steamship *Pomaron* and her owners, a[illegible]d in writing by the firms of which Messrs. [illegible] and Woolsey, Mr. Kneeland and Mr. Englar were at [illegible]are members. The stipulation recited in part:

"WHEREAS the respondent claims that its liability is limited to the value of its interest in the steamship *Pomaron* at the termination of the voyage on which she was engaged at the time of the collision and in the freight of said steamship *Pomaron* then pending, and wishes to give security for the claims of the libellants above named and all other persons having any claims against the steamship *Pomaron* and her owners up to the amount of its said interest; and

WHEREAS the respondent claims that the value of its interest in said steamship *Pomaron* at the termination of said voyage amounted to the sum of $64,389.77 and the freight to the sum of $6,029.37, making in all the sum of $70,419.14, and the libellants claim that the value of said interest is a larger amount; and

WHEREAS the issuing of process of foreign attachment has been waived in consideration of the respondent appearing herein and filing stipulation for costs and value,

the latter in the sum of $70,500., with interest from February 4, 1912, subject to the right of the libellants to apply to this Court for an appraisal of the value of the respondent's interest in said steamship *Pomaron* and her pending freight, or for an increase in the security for their claims, and the respondent agreeing to provide additional security if it shall be found by this Court that the value of the respondent's said interest exceeds said sum of $70,500. * * *."

The purpose of this arrangement was to avoid the expense incident to limitation of liability proceedings. At the time it was thought that all the claims were known and were represented by a few proctors well known to each other, and it was understood that if the petitioner was held liable, the several libellants would accept their *pro rata* shares of the value of the *Pomaron* and her pending freight.

2. After the petitioner had been held liable in the District Court and a decree had been entered consolidating the fifteen suits and awarding the libellants $172,029.81 (Collision Record, pp. 160–164) other claims theretofore unknown to the petitioner, amounting in the aggregate to about $40,000, were presented, and, although these were for the most part represented by the proctors who had filed the original libels, there were certain outstanding claims not so represented. Thereupon it became apparent that unless the decree of the District Court was reversed and the petitioner exonerated, it would be necessary to begin a proceeding under the Limited Liability Act and thus bring all persons having claims into concourse. An appeal was first taken by the petitioner to the Circuit Court of Appeals for the Second Circuit, where, on June 10, 1914, the decision of the District Court was affirmed. The decree of the District Court on the mandate of the Circuit Court of Appeals was entered October 2, 1914.

3. October 5, 1914, the petitioner filed its petition for limitation of liability in the District Court for the Southern District of New York. Pursuant to the usual monition, all persons claiming damages by reason of the collision were cited to appear and prove their claims January 18, 1915, and were also cited to appear and answer the petition at the same time; otherwise, they were to be defaulted and barred from participation in the stipulation mentioned in the next paragraph of this affidavit (*200-201).

4. An order of appraisal was entered October 8, 1914, fixing the value of the *Pomaron* and her pending freight at $70,419.14, and directing the petitioner to file a stipulation for value in the sum of $70,500., which was done (66-67). This stipulation was for exactly the same amount as the stipulation filed in the collision case. This order for appraisal provided further that the provisional valuation of $70,419.14 should stand as the appraisal by the District Court of the amount or value of the petitioner's interest in the *Pomaron* and her pending freight unless exceptions should be filed on or before January 23, 1915 (67-68).

The petition for limitation of liability alleged in article sixth that the petitioner's interest in the *Pomaron* and her pending freight was $70,419.14 (17-18). For any claimant to be in a position to attack this provisional valuation it was necessary, therefore, both to deny the allegation of the sixth article of the petition that the value was $70,419.14, and also to except to the order of October 8, 1914, fixing the valuation at this amount.

5. The libellants in the fifteen libels in the collision case filed claims in the limitation proceeding, based wholly on the judgments they had secured. The

* The references are to folios of the Limitation Record unless otherwise stated.

amounts of the respective judgments as they appear in the decree in the collision case entered June 13, 1913 (Collision Record, pp. 162–164), are identical with the amounts of the claims filed in the limitation proceeding as reported by the Commissioner, and as recited in the decree in the limitation proceeding (228–232, 719–724), except as the claims were increased by separate items representing interest from June 13, 1913, or costs taxed on the decree on mandate of the Circuit Court of Appeals entered in the District Court October 2, 1914. The Commissioner's report shows on its face that the claims were based on the judgments secured in the collision case, and the decree in the limitation proceeding refers specifically to the Commissioner's report (706–707). The judgments in the collision case and the claims of these respondents in the limitation proceedings (except interest or costs) may be detailed as follows:

	Judgment in Collision Case	Claim in Limitation Proceeding
1. Yang-Tsze Insurance Assn Ltd. *et al*.....	$19,737.59 (Record, p. 162)	$19,737.59 (Record, fol. 722)
2. Nord-Deutsche Ins. Co. *et al*.....	14,252.02 " " "	14,252.02 " " 720
3. Federal Ins. Co. *et al.*	24,035.04 " " "	24,035.04 " " 723
4. Walter Oloffson *et al.*	2,039.97 " " "	2,039.97 " " 720
5. M. H. Silvera.....	2,135.59 " " "	2,135.59 " " 720
6. Hazan & Co.....	1,247.35 " " 163	1,247.35 " " 722
7. Boston Ins. Co.....	9,768.93 " " "	9,768.93 " " 722
8. Walter D. Despard..	14,831.24 " " "	14,831.24 " " 724
9. Eugene J. F. Coleman.....	5,706.27 " " "	5,706.27 " " 720
10. Marshall K. Weidensaul.....	1,118.27 " " "	1,118.27 " " 721
11. Francis W. Van Praag.....	1,115.57 " " "	1,115.57 " " 721
12. Orton G. Orr.....	28,250.85 " " "	28,250.85 " " 721
13. Laura Moore.....	11,977.41 " " "	11,977.41 " " 720
14. Louis Bertschman..	30,815.22 " " "	30,815.22 " " 722
15. United States of America.....	4,998.49 " " "	4,998.49 " " 723

Thus there was no issue between the petitioner and these respondents with respect to the amounts at which these claims should be allowed. The amounts thereof as well as the question of liability therefor were *res adjudicata.*

Also, as the total amount of these claims, namely, $172,029.81, far exceeded the limitation value of the *Pomaron* and her pending freight, namely, $70,419.14, the petitioner had no interest whatever either in the aggregate amount or in the amount of the individual claims.

6. There was no issue as to the amount of the fund. A stipulation for $70,500 had been given in the collision case and approved by all the parties thereto, and a bond for the same amount was given in the limitation proceedings. At the trial of the collision case it was stipulated that the value of the ship, meaning the value of the petitioner's interest for limitation purposes, was $70,500 (Collision Record, p. 66). No exceptions were filed to the provisional valuation of $70,419.14 contained in the order of October 8, 1914, except by Mr. Kneeland and Mr. Kirlin.

Mr. Kneeland's exception on behalf of the Federal Insurance Company *et al.* (167-168) went only to the point that the stipulation for value should have included $9,122.83 received by the petitioner from the *Alleghany's* owners in part payment of the *Pomaron's* damages. The petitioner agreed even before the limitation proceeding was begun to turn this sum over to the claimants, if it should ultimately be held liable, and on or about September 10, 1914, my office wrote to Mr. Kneeland that this sum would be added to the fund. It was so added later and paid into Court in addition to the amount of the stipulation.

Mr. Kneeland's answer to the sixth article of the peti-

tion, on behalf of the Federal Insurance Company *et al.* (141–144), so far as it denied that the value of the *Pomaron* and her pending freight was only $70,419.14, merely objected that the aforesaid sum of $9,122.83 received on account of the *Pomaron's* damages should be added to the value, and except for this did not deny that the value was $70,419.14.

Mr. Kirlin's exception (173–176) on behalf of Yang-Tsze Insurance Assn., Ltd. *et al.* to the provisional valuation of $70,419.14 in the order for appraisal of October 8, 1914, was wholly indefinite and stated no ground of objection. Whatever point there might otherwise have been in the exception, it had no effect whatever because Mr. Kirlin filed no answer to the petition. The sixth article of the petition (17–18) set forth in detail the value of the *Pomaron* and her pending freight and stated the same at $70,419.14. By failure to deny or answer the allegations of this article Mr. Kirlin admitted the same on behalf of his clients.

The answer to the petition filed by Mr. Englar's firm on behalf of Eugene J. F. Coleman (589–602) in article sixth (594) denied knowledge or information as to article sixth of the petition. Mr. Englar, however, filed no exception to the order of appraisal entered October 8, 1914, and by the terms of this order (68) the valuation of $70,419.14 therefore stood as to Mr. Englar's client notwithstanding the allegations of his answer.

7. Further, there was no issue in the limitation proceeding as to the petitioner not being in privity with the disaster. Any issue as to liability had already been determined against the petitioner in the collision case. Most of the claimants filed no answers to the petition. As to them its allegations were therefore to be taken as

confessed and admitted. Of the claimants who now make this motion only the Federal Insurance Company *et el.*, represented by Mr. Kneeland, and Eugene J. F. Coleman, represented by Mr. Englar, filed answers (137–149, 589–602).

Both these answers alleged that the liability of the petitioner was *res adjudicata* by reason of the decision in the collision case (148–9, 600), and this was the fact. They both admitted that the petitioner was without privity as alleged in the fourth article of the petition (10–11). Mr. Kneeland's answer admitted this by express recital in article third (139). Mr. Englar's answer in article fourth (593–594) admitted the allegation of article fourth of the petition with respect to the petitioner's freedom from privity by failing to deny it.

The prayers of Mr. Kneeland's answer (132–133) and of Mr. Englar's answer (601) are both to the effect that the petition be denied so far as it prays that the petitioner be adjudged not liable to any extent. They do not pray that limitation of liability be denied. This, of course, constitutes an admission that the petitioner was entitled to limit its liability, which had, as I have said, been conceded from the beginning.

8. On the face of the limitation proceedings, therefore, without proof of any kind, the petitioner had the right to a limitation of its liability and to the entry of a decree which would give it exactly the relief that the decree entered April 22, 1915, did give. Instead of that decree being based on compromise and mutual concessions as between the petitioner and the respondents, it is apparent that it was merely one form of giving the petitioner the relief to which it was indisputably entitled under the statute and which had been conceded by all parties

from the beginning of the litigation in February, 1912. There were no issues left to compromise, the claimants gave up nothing and sustained no prejudice whatever. So far as it is possible to say correctly that there was a compromise, it was only with respect to the steps necessary to have a decree entered in view of the proceedings and results of the collision case, and did not go to the question of liability between the parties. That question had already been determined against the petitioner by the courts below. In paying the limitation fund into court pursuant to the decree of April 22, 1915, the petitioner was in exactly the same position as if it had paid money under any other decree. In so doing it yielded to the order of the court based upon a determination of liability, and the payment was made under compulsion. Even if there had been any questions left to compromise they could only have been with respect to limitation of or exoneration from liability already adjudged and not with respect to the liability itself. The recital of compromise and settlement in the decree cannot affect these facts.

9. The question now raised by the motion to dismiss or affirm has already been passed on by this Court in favor of the petitioner. In our second application for the writ of *certiorari* we stated:

"Subsequent to the decision of the Circuit Court of Appeals your petitioner instituted proceedings for limitation of liability, which, after the denial by this Court of the original petition, were prosecuted to a decree under which payments were made to the respondents by the Clerk of the District Court. As these payments were made under compulsion they would be recoverable by your petitioner in the event that this court should reverse the decision of the Circuit Court of Appeals."

Mr. Kirlin opposed the granting of the writ on the ground that the case had been settled and closed and on

pages 3–5 of his memorandum in opposition set forth various facts with respect to the entry of the limitation decree of April 22, 1915. As the facts were thus presented to this Court and the writ of *certiorari* was granted nevertheless, it is respectfully submitted that the questions sought to be raised by the motion to dismiss or affirm are no longer open to the respondents.

10. After the writ of *certiorari* was granted, and on July 1, 1915, within the term at which the limitation decree of April 22, 1915, was entered, the petitioner moved before the District Court for the Southern District of New York that the decree of April 22, 1915, be opened and vacated, amended and corrected and that the limitation proceeding be continued until this Court should render its decision on the writ of *certiorari*. General Rule 5 of said District Court provides:

"For the purpose of making and filing bills of exceptions and making any and all motions necessary to be made within the term at which any judgment or decree is entered, each term of this Court shall be, and hereby is, extended so as to comprise a period of three calendar months beginning on the first Tuesday of the month in which verdict is rendered, or judgment or decree entered."

This motion was opposed by those claimants on whose behalf this motion to dismiss or affirm is made.

The District Court ordered July 3, 1915 (809–817) that no decision be made on the merits of the motion until this Court should have rendered its decision on the writ of *certiorari*, and that the term of the District Court for all purposes of the relief sought by the petitioner be extended until the decision of this Court and until appropriate action thereunder by the Circuit Court of Appeals and the

District Court. The order also provided that the motion be continued until the further order of the District Court.

Until this Court shall reverse the determination of the Circuit Court of Appeals and a proper decree is entered in the District Court, there can be no reason for disturbing the limitation decree of April 22, 1915, because it is based on the liability fixed by a decree which this Court is about to review. If this Court reverses the decree in the collision case, then the District Court will have a right to act and the petitioner can take such proceedings as may be necessary to open, vacate, amend and correct the decree in the limitation proceeding and secure restitution of the moneys which have been paid pursuant to the erroneous decrees adjudging liability.

It is therefore respectfully submitted that this is not a moot case, and that the motion to dismiss or affirm should be denied.

CHARLES C. BURLINGHAM

Sworn to before me this 16th day of December, 1916.

ROSCOE H. HUPPER,
Notary Public,
New York Co., No. 302.

[SEAL]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1916

No. 106

FURNESS, WITHY & COMPANY, LIMITED
(Respondent-Appellant)
Petitioner

vs.

YANG-TSZE INSURANCE ASSOCIATION,
LIMITED, *et al.*
(Libellants-Appellees)
Respondents

BRIEF FOR PETITIONER IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

The contention of the respondents who make this motion amounts to this: That because the petitioner on April 22, 1915, after this Court had denied its first application for *certiorari* April 19, 1915, paid, pursuant to a decree entered by consent in the limitation proceeding, the amount to which it was indisputably and concededly entitled to limit its liability as adjudged in this suit, the case has become moot and the petitioner cannot be heard under the writ of *certiorari* granted June 14, 1915, on its second application, to dispute that it was rightly held liable by the decree here under review.

In other words, say these respondents, the petitioner, by availing itself of the benefit of the statutes limiting liability, before its liability was finally determined, has barred itself from further contesting whether it was liable at all.

So extraordinary a proposition seriously advanced calls for the closest scrutiny. More particularly is this so in this case than in any other which has come to our attention, because the contention made is in reality based on and designed to take advantage of this Court's decision of April 19, 1915, not to grant the writ of *certiorari*.

The petitioner's action in paying the limitation fund pursuant to the consent decree entered April 22, 1915, was taken because, *certiorari* having been denied, there was then no opportunity to contest further, either in the collision case or in the limitation proceeding, the question of the liability which had been adjudged against the petitioner. We say this to the end that if this Court, notwithstanding the proceedings already taken by the petitioner in the District Court within the term at which the decree of April 22, 1915, was entered, to open, vacate, amend and correct it, should, nevertheless, by any chance perceive in that decree any obstacle to the prosecution of this writ or to the attainment by the petitioner of its rights in case the decision of the Circuit Court of Appeals is reversed, all applicable presumptions may be indulged in the petitioner's favor.

We direct the Court's attention at the outset to the fact that on its second application for *certiorari* the petitioner specifically stated at page 4 of its petition that, subsequent to the denial of its first application, the limitation proceeding had been prosecuted to a decree under which payments had been made. Mr. Kirlin opposed

the second application on the ground that the case was settled and closed, as appears from pages 3–5 of his memorandum in opposition to the petition. As the substantial facts were all before this Court when the second application was granted, we submit that the questions sought to be raised by this motion are no longer open to the respondents.

Another consideration of great importance with respect to whether this motion can be prosecuted is that the limitation decree of April 22, 1915, is still subject to the action of the District Court. Soon after the writ of *certiorari* was granted, and within the term at which that decree was entered, the petitioner moved before the District Court to open, vacate, amend and correct it, and to extend the term. The District Court by an order entered July 3, 1915, extended its term and continued the motion, so that appropriate action may be taken by that Court in the event that this Court shall reverse the decision of the Circuit Court of Appeals. Until that decision is reversed there is no basis for action by the District Court. If the decision of the Circuit Court of Appeals is not reversed no action will ever be necessary, for in the present status of affairs, *i. e.*, with liability adjudged against the petitioner, the decree expresses the rights of the parties. The action to be taken by the District Court with respect to the decree may depend on matters not in the record, as is shown in the affidavit of Mr. Burlingham submitted herewith. It is not improbable that testimony will be taken before the District Court. The petitioner's motion in the District Court to open the decree was opposed by, and undoubtedly will still be opposed by, these respondents. It must now be presumed, we submit, that the District Court will make a proper disposition of the

motion when the matter is ready to be proceeded with there.

The matter having been presented to the District Court within the term at which the decree was entered, there can be no doubt that it has full power to open, vacate, amend and correct the decree, and to take whatever steps may be necessary to accomplish justice. *Ex Parte Lange*, 18 Wall. 163, 167; *Memphis* v. *Brown*, 94 U. S. 715; *Barrell* v. *Tilton*, 119 U. S. 637. That the decree is such as can be opened, vacated, amended or corrected is also beyond doubt. See *Kelley* v. *Milan*, 127 U. S. 139; *Mayor, etc., of Vicksburg* v. *Henson*, 231 U. S. 259; *Pacific Railroad* v. *Ketchum*, 101 U. S. 289; *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683, 692. Neither is it to be doubted that the District Court will take appropriate steps, as courts of Admiralty act upon equitable principles. See *Erie R. R. Co.* v. *Erie Transpt. Co.*, 204 U. S. 220; Benedict's Admiralty, 4th Ed., Secs. 261, 291, and cases there cited.

Unless on the papers now before this Court it can be held that by no possibility could the petitioner ever secure appropriate relief in the District Court in the event that this Court shall reverse the decision of the Circuit Court of Appeals, then it cannot be said that this is a moot case, and the present motion must fail.

Coming now to discuss the respondent's contentions that this is a moot case, we observe preliminarily that in the first paragraph of this memorandum we have stated their contentions according to their legal effect in view of the steps taken both in the collision case and in the limitation proceeding. We suppose these respondents would not for a moment contend that if the full amount of the decree in the collision case had been paid the case would

thereby have become moot. We say this the more confidently because they have cited *Dakota County* v. *Glidden*, 113 U. S. 222, 224, where Mr. Justice Miller said:

"There can be no question that the debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money."

Since the greater includes the less, we suppose also that the respondents would not contend that payment of only part of the decree in the collision case made that case moot, and would still admit that the money paid could be recovered back if the decree were reversed.

Further, we think by parity of reasoning that it is not unfair to impute to these respondents an admission that if the liability had been adjudged in the limitation proceeding, as under the statutes and under Rules 54 and 56 of this Court in Admiralty might have been done, then the petitioner could recover back, on reversal, whatever amount might have been paid under the decree entered in the limitation proceeding, irrespective of whether that decree had limited liability or held the petitioner to full liability.

The position here is that these respondents have been paid in the limitation proceeding begun *after* the lower courts held the petitioner liable only part of their judgments secured in the collision case, being the exact amount to which the petitioner's liability would have been limited in a limitation proceeding which might have been begun *before* the collision case went to decree. Nevertheless the respondents contend that the case has become moot. Unless the *time* when a limitation proceeding is begun is the important factor—and not the *question involved*—their contention that the case is moot

is inconsistent with the proposition that moneys can be recovered back under the circumstances above stated.

The respondents contend that there has been a solemn settlement and compromise of the issues. What issues, we ask? Certainly not the issue of the petitioner's liability for the collision, for that was already *res adjudicata* by the decision in the collision case, now here for review. Their answers in the limitation proceeding alleged that the question of liability was *res adjudicata*. Their motion papers and brief will be searched in vain for any suggestion that the question of the petitioner's liability was compromised. The specific matters which they contend were compromised are stated on page 22 of their brief, in substance as follows:

(*a*) The matter of the value of the petitioner's interest in the *Pomaron* and her pending freight.

(*b*) The matter of the petitioner's right to limitation of liability.

(*c*) The discharge of the petitioner from all claims everywhere.

(*d*) Agreement between the various claimants as to their respective claims.

(*e*) Exclusion of other claimants who did not file claims.

The suggestion of a compromise with respect to (*a*) and (*b*) is wholly erroneous. These matters were not in a position for compromise. Either the allegations of the sixth article of the petition with respect to the value of the *Pomaron* and her pending freight were not answered and denied, or the provisional valuation in the order for appraisal entered October 8, 1914, was not excepted to.

Unless the sixth article of the petition should be denied, and this order of October 8, 1914, excepted to, the valuation of $70,419.14 stood. Most of the claimants did not answer the petition at all, and thus admitted all its allegations. None of the claimants who did answer denied the right to limit liability, which had, indeed, been conceded from the very beginning of the litigation. Thus no claimant was in a position to contest the entry of just such a decree as was entered.

The facts with respect to the total absence of issues are fully set forth in Mr. Burlingham's affidavit submitted herewith.

As to (*c*) and (*e*), these matters were not the subject of any compromise, but followed inevitably from the entry of the decree pursuant to the Limited Liability Statute and Rules.

As to (*d*), the claimants now before this Court made no compromise or concession whatever among themselves. Their claims in the limitation proceeding were based on the judgments secured in the collision case and were allowed at the full amount of such judgments. So far as these respondents may have made any concessions to other claimants not before this Court, the point is not material. Concessions made (if there were any such) between the claimants themselves had no bearing on the petitioner's rights, as the limitation fund was much less than the total liability adjudged in the collision case.

Thus it is seen that the supposed grounds of compromise are wholly unsubstantial.

The principal difficulty with the respondents' position is that they have disregarded the fact that the collision case and the limitation proceeding, so far as the question of liability was concerned, were not separate and unre-

lated proceedings. The determination of liability in the first was the basis for the application of limitation of liability in the second. The liability was *res adjudicata* in the limitation proceeding. The respondents themselves contended for this principle in such answers as were filed, and they have signally benefited by its application in that their judgments proved their claims. Having claimed on the judgments and secured their payments on that theory, the claimants now choose to contend that the payments were made by virtue of a compromise and not by virtue of the judgments. It would be absurd and unjust to sustain such a contention.

All the respondents' arguments are disposed of by the fact, which the recitals of the limitation decree of April 22, 1915, in no way affect, that the limitation fund was paid because the petitioner had been adjudged liable for that amount. That the petitioner was relieved by the limitation decree (under the limited liability act) from paying that part of the collision decree in excess of the value of the *Pomaron* and her pending freight has no bearing whatever. The petitioner was not relieved from paying this excess in consideration of its paying the limitation fund, but was so relieved by the statute unconditionally. If in the limitation proceeding there had remained any issues to be compromised, those issues would have been with respect to exoneration from liability for the excess of the collision decree over the limitation fund, and not with respect to liability for the amount of the limitation fund. This is borne out by those portions of the decree quoted at pages 4–8 of the respondents' brief. It seems too obvious for serious argument that settlement and compromise (if there had been any) with respect to *exoneration from* liability for part of the col-

lision decree could in no possible sense have affected that part of the decree for which the petitioner was still held liable. Of course, if there had been a settlement and compromise it would have rendered moot all questions with respect to *limitation of* liability.

In view of the state of the pleadings in the limitation proceeding, as well also in view of the proceedings already had in the collision case, the only issues to which the recital of compromise and settlement in the decree could have applied were those with respect to such steps as should be taken for the entry of the decree. If the petitioner and these respondents had proceeded to a trial of the limitation proceeding in the District Court that court would have been bound to decide, without testimony and without argument, that the petitioner was liable and was entitled to limit its liability to the exact amount to which it was limited by the limitation decree of April 22, 1915.

With respect to all the respondents in the collision decree now here for review, the decree in the limitation proceeding did nothing more than prescribe the manner in which satisfaction of the collision decree should be made. In conformity with the limitation statute, the decree in the limitation proceeding provided that the collision decree now under review should be satisfied by payment of less than its face amount. If it does more with respect to claimants who were not parties to the collision decree it may be that their rights will not be affected by a reversal of the decree, but those persons are not before this Court, and the possible effect of a reversal upon their rights need not now be considered.

Mr. Burlingham's affidavit clearly shows that there was in fact no compromise or settlement of any issue in

the limitation proceeding. Not only does it appear that no concessions of any kind were made by the respondents to the petitioner, but it is not even suggested by the respondents that any concessions of any kind were made to them by the petitioner. If there had been a compromise, it would have been one where, upon the respondents' own statement, but one party to it yielded anything. The actual fact is that there was no compromise. As Mr. Burlingham's affidavit states, all the parties to the decree now under review recognized from the very outset the petitioner's right to limit its liability, and the entire litigation was carried on with that understanding. The sole reason for the limitation proceeding was the discovery of claimants other than the parties to this litigation and who were not subject to the arrangement made in respect thereto, which was virtually for a limitation of liability by consent in case the courts should hold the petitioner liable.

At pages 8–10 of their brief the respondents have noted nine different circumstances in connection with the limitation proceeding which presumably they consider important. In view of the status of the limitation proceeding when the decree of April 22, 1915, was entered, and in the light of the foregoing considerations, we think it is clear that the circumstances mentioned are either erroneous or have no legal significance whatever. We make the following observations:

I. This is incorrect. The limitation decree of April 22, 1915, did refer to the previous proceedings in the District Court, in that the decree recited the Commissioner's report (706–710), which shows that the claims of the respondents who make this motion were based on judgments (225–232). The claims themselves filed with the

Commissioner's report show on their face that they were based on the judgments secured in the collision case (237-422).

The principal reason for the petition being filed was that there were other claimants who had not been parties to the collision case, and there was no reason why the petition should expressly refer to the previous proceedings in that case.

II. The petitioner could not be expected to admit liability in the limitation proceeding, notwithstanding that it had been held liable in the collision case. Such an admission might very well have made the case moot, cutting off the petitioner's right to apply for or prosecute the writ of *certiorari*.

III. The petitioner's interest in the *Pomaron* and her pending freight was appraised by the order for provisional valuation entered October 8, 1914. This valuation was also stated in article sixth of the petition. It was not so denied or excepted to as to raise any issue, and there was no compromise whatever with respect thereto.

IV. The respondents who make this motion made no compromise whatever with respect to their claims, but the same were allowed at the full amount of the judgments which they had secured in the collision case.

There was no issue as to the amounts of their several claims, these having been fixed by the collision decree, and there was, therefore, no occasion for a reference or for an order of the court. Even on the entry of the collision decree the amounts of the claims were fixed by consent, without prejudice to the petitioner's right to appeal.

V. The value of the *Pomaron* was not denied or excepted to in such a way as to raise any issue.

The absence of privity or knowledge on the part of the petitioner was not denied. The answers to the petition did not pray that limitation of liability be denied and the petitioner's right to limitation of liability had been conceded from the beginning of the litigation in February, 1912.

VI. It is not material to this motion to consider the position of any claimants in the limitation proceeding who were not parties to the collision case now under review.

VII. That the petitioner was seeking the aid of the limited liability act to fix the amount which it should pay to satisfy the decree in the collision suit, made it manifestly proper that the limitation decree of April 22, 1915, should be entered on the motion of the proctors for the petitioner.

VIII. The limited liability act limits the liability of the charterer under certain circumstances as well as that of the owner. After a decree has been entered limiting liability to certain claimants to a certain amount it is difficult to see how those claimants can have any rights remaining either in this country or any other. See *Norwich Co.* v. *Wright*, 13 Wall. 104; *Providence & New York S. S. Co.* v. *Hill Mf'g. Co.*, 109 U. S. 578; *The Scotland*, 105 U. S. 24; *Butler* v. *Boston S. S. Co.*, 130 U. S. 527; *Richardson* v. *Harmon*, 222 U. S. 96; *The San Pedro*, 223 U. S. 365. It is entirely competent for our courts to issue an injunction against proceedings in another country. See *French* v. *Hay*, 22 Wall. 250, 252–253; *Cole* v. *Cunning-*

ham, 133 U. S. 107; *Carron Iron Co.* v. *MacLaren*, 5 House of Lords Cases, 416, 439. The claimants did nothing with respect to exonerating the petitioner from liability in excess of the limitation fund that would not have been accomplished by the operation of the limited liability statute properly interpreted. If there are any errors in the limitation decree of April 22, 1915, they can readily be corrected by the District Court if the decree in the collision case is reversed by this Court.

IX. The fact that the money has been paid to the claimants or their proctors is immaterial. That happens in every case where restitution becomes necessary.

The propositions above advanced with respect to the effect to be given in the limitation proceeding to the decree rendered in the collision case, and with respect to the effect to be given to the entire absence of issues in the limitation proceeding hardly require the citation of authority and we shall merely direct attention to the statutes and some of the decisions which support our conclusions: The limitation proceeding was based on Secs. 4283, 4234 and 4285 of the Revised Statutes and Admiralty Rules 54 and 56. *The Benefactor*, 103 U. S. 239, shows that the liability adjudged in the collision case was *res adjudicata* in the limitation proceeding. *Craig* v. *Continental Ins. Co.*, 141 U. S. 638; *La Bourgogne*, 210 U. S. 95, 122–123, and *Lord* v. *Goodall, etc., S. S. Co.* Fed. Cas. 8506, show that the petitioner could not have been held to be in privity with the disaster.

That to be able to contest the rights asserted by a petitioner in a limitation proceeding claimants must answer the allegations of the petition, appears from *White* v. *Island Transpt. Co.*, 233 U. S. 346, 350; *The Klotawah*, 210 Fed. Rep. 677; *The Pere Marquette*, 203

Fed. Rep. 127, 132; *In re Davidson S. S. Co.*, 133 Fed. Rep. 411. Admiralty Rules 23 and 27 in conjunction with Admiralty Rules 54 and 56 contemplate that the petition shall be answered and that the answer shall be full, explicit and distinct.

From the considerations above discussed it is apparent, we believe, that the decisions cited by the respondents in support of the motion, even if they could be considered as supporting the conclusions which the respondents have sought to draw from their statement of the facts and circumstances with respect to the limitation decree of April 22, 1915, and the effect thereof, have no application whatever to the state of facts set forth in this memorandum and in the affidavit submitted herewith. As these decisions therefore differentiate themselves we shall refrain from discussing them.

It is respectfully submitted that the motion to dismiss or affirm should be denied.

December, 1916.

BURLINGHAM, MONTGOMERY & BEECHER
Proctors for Petitioner

NORMAN B. BEECHER
ROSCOE H. HUPPER
of Counsel

DEC 14 1916
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

October Term 1916

No. 108

FURNESS, WITHY & COMPANY, LIMITED,
Petitioner,

AGAINST

TANG-TSZE INSURANCE ASSOCIATION, LIMITED, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

BURLINGHAM, MONTGOMERY & BEECHER
Proctors for Petitioner

NORMAN B. BEECHER
CHARLES C. BURLINGHAM
PAYSON H. HUPPER
Of Counsel

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FIRST POINT

THE PORTING OF THE POMARON WHEN ONE MILE DISTANT FROM THE ALLEGHANY WAS NOT A VIOLATION OF ARTICLE 21 OF THE INTERNATIONAL REGULATIONS. EVEN IF IT COULD POSSIBLY BE CONSIDERED SUCH, IT WAS SO TRIFLING THAT IT SHOULD BE DISREGARDED. THIS IS PARTICULARLY THE CASE IN VIEW OF THE GROSS FAULTS OF THE ALLEGHANY — 10

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1916

No. 106

FURNESS, WITHY & COMPANY, LIMITED
(Respondent-Appellant)
Petitioner

vs.

YANG-TSZE INSURANCE ASSOCIATION, LIMITED, *et al.*
(Libellants-Appellees)
Respondents

BRIEF FOR PETITIONER

STATEMENT

This is a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit, dated June 16, 1915. The opinion of Rogers, *C. J.*, is at page 168 of the Record, and is reported in 215 Fed. Rep. 859. The suit was in admiralty and was before the Circuit Court of Appeals on appeal from the District Court for the Southern District of New York. The trial in the District Court was before Learned Hand, *D. J.* His opinion is at page 147 of the Record, but is not reported.

The suit involves the question of the liability of the petitioner for damages sustained by owners of cargo shipped on the Hamburg-American Line steamship *Alleghany*, resulting from a collision between that vessel and the petitioners' steamship *Pomaron* off the Virginia Capes February 2, 1912. The *Alleghany* with her entire cargo sank and became a total loss.

The owners of cargo on the *Alleghany* and their insurers filed fifteen libels *in personam* against the petitioner in the District Court. The Hamburg-American Line was made a party respondent in some of the libels, but it instituted limitation of liability proceedings, admitted liability, and upon paying into court a small amount of freight money secured a decree relieving it from all further liability. The District Court entered a decree against the petitioner June 13, 1913, for $172,029.81 (Rec., pp. 160-164*). This decree consolidated all the suits (162). An appeal being taken to the Circuit Court of Appeals for the Second Circuit, this decree was affirmed (176).

The facts and circumstances of the collision are principally found in the testimony of Chief Officer Westgarth of the *Pomaron* (82-114); they may be stated shortly as follows:

The *Pomaron*, a steel screw steamship 278 feet long, sailed from Baltimore for Leith February 1, 1912, at 7 A. M., loaded with grain and general cargo. About 12.30 A. M. February 2 she discharged her pilot off Cape Henry and set a compass course East by North (E. by N. 1/4 N. magnetic), and held this course until just before the collision. Her speed was about 9 knots an hour.

The *Alleghany*, a similar steamer, 310 feet long, left New York the night of February 1 bound for the West

* All references are to pages of the Record.

Indies. She was on a course South 2 degrees West true (S. 9-1/2° W. magnetic), and her speed was about 11-1/2 knots an hour. The collision occurred about 110 miles outside of Cape Henry in latitude 37° 26′ north and longitude 73° 42′ west. The angle between the courses of the *Pomaron* and the *Alleghany* was about 111 degrees.

Soon after 10.30 A. M. February 2 chief officer Westgarth, in charge of the watch and on the bridge of the *Pomaron*, with the man at the wheel, made out the *Alleghany* ten or twelve miles away on the port bow, that is, to the northward and eastward, heading about south. The vessels were on crossing courses. In this situation the *Pomaron* was the privileged vessel and the *Alleghany* was bound to keep out of her way. It was broad daylight and the weather was absolutely clear. For three-quarters of an hour the vessels approached each other at full speed and without change of course. As it afterwards transpired, no one on the *Alleghany* saw the *Pomaron* during this entire period. The officer who should have been on the *Alleghany's* bridge was in the chartroom making calculations from his observations. The only man on her bridge was the quartermaster at the wheel, and his view to starboard in the direction of the *Pomaron* was cut off by a wind shield. The *Pomaron's* chief officer was unable to see any sign of life on the *Alleghany*, although he kept close watch upon her all the time that the two vessels were approaching each other.

When the two vessels were about one mile from each other the *Pomaron's* chief officer blew one blast of the whistle in order to attract the *Alleghany's* attention. At the same time he ordered the *Pomaron's* helmsman to port a little. This caused the *Pomaron* to go off her

course about one point to the southward and gave the *Alleghany* a little more clearance. His testimony with respect to this is as follows (85-86):

"I was watching pretty closely while he was coming up, and I saw his bearing was not changing at all; all the time he was closing in on us, but getting pretty well in view all the time until he was about a mile away, and I thought he was getting pretty close and it was time for him to do something.

Q. Did you take a look with your glass? A. Yes.

Q. Did you make out men on the bridge? A. I could see no one on the bridge at all.

Q. Had she a wheel house on the bridge? A. Yes, and she had dodgers up.

Q. A wind shield? A. Yes.

Q. Which side of the bridge was this wind shield? A. Starboard side.

Q. You saw nobody? A. Nobody on the bridge at all.

Q. They were getting pretty close? A. Yes.

Q. As close as a mile? A. Yes, so I thought I would give him a blast on the whistle.

Q. What for? A. To attract his attention.

Q. Wake him up? A. Wake him up a bit, and I also ordered the helmsman to port a little.

Q. Did he obey that order? A. Yes.

Q. How much did he port? A. She went off the course about a point; went off to about east.

Q. Why did you port? A. I had to give him a little more clearance; I expected him to come under my stern all the time, and they were getting too close as I thought to be safe.

Q. Did you think there was any danger then? A. Yes.

Q. What was the danger? A. I saw if he was going to keep on the way he was doing he would catch us somewhere about the engine room.

Q. If you had maintained your course he would have struck you near the engine room? A. Yes, about midships.

Q. Was there any indication he was changing his course at all then? A. No, none at all.

Q. And the effect of porting your helm would be to give him more room? A. Yes; by us porting like that it would get us further away; he would not catch us in the engine room, if he had not altered his course at all.

Q. If you had both maintained the courses you were

on then without change, what do you think would have happened? A. He would have run right into us amidships.

Q. Are you sure of that? A. Yes.

Q. Would not he have got across your bow? A. No, sir, could not have done it.

Q. Could you have possibly got across his bow? A. No.

Q. He was going faster than you were? A. He was going faster than we were.

Q. What was the result of this blast of yours to wake him up? A. About a minute or so after I gave him the blast he answered and gave me two blasts.

Q. You knew what that meant? A. Yes.

Q. What did it mean? A. That he was going to cross ahead of me.

Q. What did you do? A. I rang the engine full speed astern as soon as he gave me two blasts, and reversed the engine."

This blast of the *Pomaron's* whistle brought the *Alleghany's* first officer out of the chartroom. He then saw the *Pomaron* for the first time (142). He blew two blasts, put his helm hard a-starboard and his engine telegraph at full speed ahead twice (*Alleghany's* Log, 146–147). This two blast signal indicated that the *Alleghany* was directing her course to port and attempting to cross the *Pomaron's* bow, which was an improper manœuvre. The chief officer of the *Pomaron* therefore reversed his engines full speed and ordered the helm hard a-port in a last effort to escape collision and to minimize the blow. Collision was then inevitable, however, and the two vessels came together at an angle of about 45 degrees, the *Pomaron's* stem striking the *Alleghany's* starboard quarter about 100 feet from the stern (87–88), cutting into the *Alleghany* in such a way that she sank in a few hours. The *Pomaron* rescued the *Alleghany's* passengers and crew and proceeded to Newport News.

The more important articles of the International Regulations for preventing collisions at sea in force at the time of the collision are as follows:

PRELIMINARY

Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist (26 Stat. L. 326).

TWO STEAM VESSELS CROSSING.

ART. 19. When two steam-vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other (26 Stat. L. 327).

COURSE AND SPEED

ART. 21. Where, by any of these rules, one of two vessels is to keep out of the way the other shall keep her course and speed.

NOTE.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision. (See articles twenty-seven and twenty-nine.) (28 Stat. L. 83).

CROSSING AHEAD

ART. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other (26 Stat. L. 327).

STEAM VESSELS SHALL SLACKEN SPEED OR STOP

ART. 23. Every steam-vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse (26 Stat. L. 327).

GENERAL PRUDENTIAL RULE

ART. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger (26 Stat. L. 327).

SOUND SIGNALS FOR VESSELS IN SIGHT OF ONE ANOTHER

ART. 28. The words "short blast" used in this article shall mean a blast of about one second's duration.

When vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle or siren, namely:

One short blast to mean, "I am directing my course to starboard".

Two short blasts to mean, "I am directing my course to port".

Three short blasts to mean, "My engines are going at full speed astern" (26 Stat. L. 328).

PRECAUTION

ART. 29. Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case (26 Stat. L. 328).

PROCEEDINGS IN THE COURTS BELOW

The District Judge, on the supposed authority of this Court's decision in *The Pennsylvania*, 19 Wall. 125, felt compelled to condemn the *Pomaron* for porting her helm at the distance of a mile, which he held to be a violation of Article 21, because he was unable to find that the collision would have occurred if she had not so ported—notwithstanding, as we shall show later, that it was absolutely certain that the porting did not contribute to the collision. The reluctance with which he reached this result is reflected in the following language from his opinion (156):

"I have already said that the result seems to me extremely inequitable and I should be glad if an appellate court could find otherwise, but while the holding-on ship

is charged with the burden of proof, I can see no alternative. The case is one which shows the necessity for the proposed new rule which will not hold each ship *in solido*, but will apportion liability according to fault. Had that been open to me, I should have attributed a very small fraction of blame indeed to the *Pomaron*. As it is, under what I cannot help calling a very mechanical and arbitrary rule of law, I see no escape from assessing this ship with the full loss for a trifling violation of the rule, for it remains true, however we may regret the result, that only unfounded speculation can justify us in saying that the violation could not have produced the collision."

The Circuit Court of Appeals agreed with the District Court that the burden of proof rested upon the *Pomaron* "to show that the fault she committed could not have been one of the causes of the collision" (172), and concluded that as it was impossible to establish with certainty that the collision would have occurred even if she had not ported slightly the *Pomaron* had not sustained the burden which rested upon her.

Questions Presented

For the petitioner we shall argue:

(*a*) That the International Regulations did not apply under the circumstances to the manœuvres of the *Pomaron* when she ported a mile distant from the *Alleghany*, and that the porting was therefore not a statutory fault; and that even if the porting was a fault, it was so trifling that it should be disregarded, particularly in view of the gross fault of the *Alleghany*.

(*b*) That the porting of the *Pomaron* not only did not contribute to the collision but that by no possibility could it have contributed, and that her subsequent manœuvres were justifiable.

(c) That this Court in *The Pennsylvania* merely held that a violation of a statute creates a presumption of contributory fault which can only be rebutted by positive proof that the fault did not contribute to the disaster; and that the lower courts erred, therefore, in placing upon the *Pomaron* the burden of showing that her initial porting could not have contributed to the collision, entirely irrespective of whether it did in fact contribute and notwithstanding that it actually did not contribute.

At every step of the argument it is to be remembered that the *Pomaron* did nothing which hindered or embarrassed the *Alleghany* in the slightest degree, that on the contrary the *Pomaron's* porting was well calculated to avoid disaster, and that, therefore, the *Pomaron* can be condemned only if such a result is made necessary by what the District Judge described as "a very mechanical and arbitrary rule of law".

FIRST POINT

THE PORTING OF THE POMARON WHEN ONE MILE DISTANT FROM THE ALLEGHANY WAS NOT A VIOLATION OF ARTICLE 21 OF THE INTERNATIONAL REGULATIONS. EVEN IF IT COULD POSSIBLY BE CONSIDERED SUCH, IT WAS SO TRIFLING THAT IT SHOULD BE DISREGARDED. THIS IS PARTICULARLY THE CASE IN VIEW OF THE GROSS FAULTS OF THE ALLEGHANY.

Two questions are involved under this point:

(1) Were the circumstances such that Article 21 applied to the *Pomaron's* navigation when she first ported?

(2) If so, was the actual change of course made under the circumstances of such a nature that it should be held a fault?

Before proceeding to discuss these questions it is proper to note the purpose of the International Regulations in general and of Articles 19 and 21 thereof in particular. Those articles provide:

ART. 19. When two steam-vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

ART. 21. Where, by any of these rules, one of two vessels is to keep out of the way the other shall keep her course and speed.

The whole object of Article 21 is to prevent collision by affording to the burdened vessel under Article 19 a certainty with respect to the action to be taken by the privileged vessel, so that the burdened vessel will not be defeated or baffled in the performance of her duty to keep out of the way. The starboard hand rule (Article 19) is purely

arbitrary. It would be equally effectual to prevent collision if, instead of imposing on the vessel which has the other upon her starboard hand the duty to keep out of the way, that vessel were treated as the privileged vessel and directed to keep her course and speed. The essential hing is that each vessel shall be assured in advance as to the course of the other vessel. To provide such assurance is the purpose of the rules. Without this misunderstandings would be frequent and the number of collisions greatly increased. These propositions are self-evident, and require no citation of authority further than will be observed *infra*.

Article 21 is not to be applied too rigidly, however. Slight fluctuations in speed or variations in course are inevitable. The question in any case is whether the change was of such character and extent as naturally and reasonably to affect or embarrass the navigation of the other vessel. A substantial maintenance of course and speed is all that can be required in any case.

Coming now to discuss the questions stated *supra*, (1) Did Article 21 apply to the *Pomaron's* navigation at the time she ported?

The rules of navigation apply only when to disregard them would create risk of collision, and whether they apply or not is determined by all the circumstances of the particular case. The important circumstances of this case, it must constantly be remembered, are that it was broad daylight and perfectly clear weather; that the vessels were on the open ocean; that the *Pomaron* ported while still a mile away; that the *Alleghany* had not then seen the *Pomaron* and did not know her course; and that if she had observed the *Pomaron* at that moment, she could easily have avoided collision by passing under

the *Pomaron's* stern, as it was her duty to do and as she had time to do then and for some period thereafter.

In *New York & Liverpool U. S. Mail S. S. Co.* v. *Rumball*, 21 How. 372, Mr. Justice Clifford said, at pages 384-385:

"Rules of navigation, such as have been mentioned, are obligatory upon vessels approaching each other, from the time the necessity for precaution begins, and continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remain. They do not apply to a vessel required to keep her course after the approach is so near that the collision is inevitable, and *are equally inapplicable to vessels of every description, while they are yet so distant from each other that measures of precaution have not become necessary to avoid a collision.* Sailing vessels approaching a steamer are required to keep their course on account of the correlative duty which is devolved upon the steamer to keep out of the way, in order that the steamer may know the position of the object to be avoided, and may not be led into error in her endeavor to comply with the requirement. * * * Such precautions as are inculcated in the rule referred to are enjoined, as before remarked, to prevent collision and afford security to life and property; and *in a case where the rule could not be followed without defeating the end for which it was established, or without producing the mischief which it was the design of the rule to avert, of course it would not be applicable, and in such a case a departure from it would be both justifiable and commendable.*" (Italics ours.)

With respect to when "measures of precaution" become necessary the same learned Justice said in *The Nichols*, 7 Wall. 656, at page 664:

"Sailing ships are meeting end on within the the meaning of that provision when they are approaching each other from opposite directions, or on such parallel lines as involve risk of collision on account of their proximity, and when the vessels have advanced so near to each other that the necessity for precaution to prevent such a disaster begins, which cannot be precisely defined, as it must

always depend, to a certain extent, upon the state of the navigation, and the circumstances surrounding the occasion."

A very important English decision as to when the Regulations become applicable is *The Banshee*, decided by Lord Esher, *M. R.*, Lindley, *L. J.*, and Lopes, *L. J.* in the Court of Appeal in 1887, reported 57 L. T. 841, and 6 Asp. M. C. N. S. 221. In that case the *Kildare*, being the privileged vessel, was about 800 yards ahead of and was being overtaken by the *Banshee*, the burdened vessel, in Dublin Bay about 8 P. M. January 27, 1886. Under Article 22 of the Regulations for preventing collisions then in force it was the duty of the *Banshee* to keep out of the way of the *Kildare;* and it was the duty of the *Kildare* to keep her course—just as if the vessels had been on crossing courses like the *Alleghany* and the *Pomaron.* The *Kildare* ported on account of a pilot vessel and thus changed her course. Notwithstanding this porting the *Banshee* by reasonable precautions might have avoided collision. The Court of Appeal held that when the *Kildare* ported 800 yards distant, the regulations had not become applicable, that the *Kildare* was not to blame for porting so far ahead of the *Banshee* that the latter could by reasonable care have avoided a collision; and that the *Banshee* was solely to blame. The decision is so apposite that we quote somewhat at length. Lord Esher, *M. R.*, said, at pages 222-223:

"Now at what period of time is it that the Regulations begin to apply to two ships? It cannot be said that they are applicable however far off the ships may be. Nobody could seriously contend that, if two ships are six miles apart, the Regulations for Preventing Collisions are applicable to them. They only apply at a time when, if either of them does anything contrary to the Regulations, it will cause danger of collision. None of the Regulations

apply unless that period of time has arrived. It follows that anything done before the time arrives at which the Regulations apply is immaterial, because anything done before that time cannot produce risk of collision within the meaning of the Regulations. We therefore have to determine if anything was done by either of these vessels contrary to the Regulations at a time when the Regulations were applicable. After the time when the Regulations become applicable, one of them clearly provides that the leading vessel is to keep her course. Now, a very important question has been raised as to what is the meaning of a vessel keeping her course; but on the present occasion it seems to me to be unnecessary to decide that matter. If what took place with regard to the *Kildare's* porting before this regulation as to keeping her course applied, the porting is immaterial. After the regulation applied she was bound to keep her course within the meaning of the regulation, and if after that time she never did alter her course, she has not been guilty of a breach of the Regulations. And if she has not been guilty of any breach of the Regulations it is obvious that the *Banshee* must be solely to blame, because it was her duty, if the *Kildare* was guilty of no breach of the Regulations, to keep out of her way. Therefore the first question is this: was the first porting of the *Kildare* at such a distance from the *Banshee* that it can be said that that porting was not within the Regulations. * * * There were 800 yards between the two steamers at the time when the *Kildare* ported as she says she did, and we believe she did, on account of the pilot vessel. Whether, therefore, it was right for her to port and go under the stern of the pilot boat, or whether it would not have been better for her to have gone ahead of it, is wholly immaterial. Whatever she did then was before the Regulations began to apply. If so, it cannot be said that she has infringed the Regulations."

Lindley, *L. J.*, said, at pages 223-224:

" My difficulty in connection with the overtaking rule is this, whether the porting of the *Kildare* was justifiable, having regard to the fact that the *Banshee* was behind her and overtaking her. If the *Banshee* was, when the *Kildare* ported, so far astern that with reasonable care she could by altering her course have kept out of her way, then the *Kildare* was not to blame. If, on the other hand,

the *Banshee* was so near that she could not reasonably get out of the way when the *Kildare* altered her course, then the *Kildare* was to blame. I am somewhat struck with the fact that the master of the *Kildare* says he did not bother himself to look round at the *Banshee*. But from the evidence I gather that at that time the *Banshee* was about 800 yards astern, and if that was so we are advised that there was ample time for the *Banshee* to have got out of the way of the *Kildare*. It therefore appears to me that we are justified upon the evidence in saying that the *Kildare* did not infringe the Regulations, while the fact that the *Banshee* was to blame seems to be too obvious to require argument."

And Lopes, *L. J.*, said, at page 224:

"A difficult and important question has been raised in this case as to the meaning of the provision in the Regulations that an overtaken vessel shall keep her course. It is, however, unnecessary in this case to express an opinion on the meaning of those words, because the evidence satisfies me that the *Kildare* did not alter her course after any of the Regulations became applicable, they only becoming applicable when there is danger of collision. In my opinion she ported before there was any danger, and therefore she is not brought within the Regulations. For these reasons I am satisfied that the *Banshee* was solely to blame."

In *The Bellanoch* [1907] P. 170, affirmed by the House of Lords [1907] A. C. 269, the *Canning* and the *Bellanoch* were navigating slowly on crossing courses in the shallow waters of Monte Video Roads December 24, 1905. The *Bellanoch* was dragging through the mud at about one mile per hour. She was the privileged vessel and it was the duty of the *Canning* to port and pass under her stern. The *Bellanoch*, as the *Canning* approached from less than a mile, had been putting her engines full speed astern to clear her propeller, but had given no three-blast signals to indicate this fact to the *Canning* in accordance with Article 28 of the International Regulations. Her engines were going ahead, however, from 4.40 A.M. until

4.45 A.M. when the *Canning* came into collision. In these five minutes the *Canning* had covered only about one-third of a mile. Lord Alverstone, *C. J.*, held that the Regulations did not apply to the reversing of the engines when the *Canning* was more than a third of a mile away. At pages 181-182 he said:

"There was, therefore, in my opinion no obligation upon the *Bellanoch* to sound her whistle, indicating that she was going astern, during the time that the *Canning* was coming down from the breakwater until she got in proximity to the buoys. The action of the *Bellanoch* in going astern, at the periods mentioned in the log, was action taken by her not in consequence of the approach of the *Canning*, but in the ordinary course of her navigation so as to enable her to go ahead upon her eastern course as fast as the condition of the mud would permit her. * * *

"It is true that Art. 28 refers to the signals being given when vessels are in sight of one another, but the words immediately following 'in taking any course authorized or required by the rules', show that it does not mean in sight at any distance, but in sight with reference to the manœuvres which a vessel is authorized or required to take, having regard to the other vessel approaching, for the purpose of avoiding collision. * * *

"I think that any retardation of her speed prior to 4.40 was in the ordinary course of her navigation *and not when she was bound to act with reference to the Canning, whose duty it was to keep out of her way.*" (Italics ours.)

The House of Lords in *The Peter Benoit*, decided November, 1915, 13 Asp. M. C., N. S., 203, indicated that until two steamships on crossing courses were nearer than three-quarters of a mile from each other risk of collision was not involved. Lord Atkinson said, at page 206:

"This is a clear admission that the *Peter Benoit* had the *Aurrera* on her starboard bow from the time he first saw the latter's lights, one-and-a-half miles distant, till she came within three-quarters of a mile of him; that while the *Aurrera* was still keeping her original course, the *Peter Benoit* ported her helm and changed her course

to starboard, and that she persisted in doing that, and going at full speed ahead, notwithstanding that she had received two signals from the *Aurrera*—that she, the *Aurrera*, was going to port under a starboard helm. Their courses thus became crossing courses, necessarily involving, *if continued*, risk of collision. 'Under 19th and 21st of the Regulations for Preventing Collisions at Sea, the *Peter Benoit* was the ship which ought to have given way. She did not do so. She did the very opposite. She still ported, and persisted in going full speed on a port helm, notwithstanding the signals she had received, intending, as her captain said, to cross the bows of the *Aurrera*."

The decision of this Court in *The Victory and The Plymothian*, 168 U. S. 410, also has a bearing as to when the Regulations become applicable in view of the distance at which the effect of what might be called a wrong manœuvre by a privileged vessel can be avoided by a burdened vessel. As to whether the *Plymothian* was at fault in not detecting the first two-blast signal of the *Victory* and in blowing single blast signals, in view of there being sufficient room to correct the proposed erroneous course, Mr. Chief Justice Fuller said, at page 429:

"We have already indicated that the evidence is to our minds satisfactory that the two-blast signal was blown when the *Victory* was below Craney Island Light House. If so, the vessels were a mile and one-eighth apart and the *Victory* was on the *Plymothian's* port bow. The *Plymothian* blew three single-blast signals after that time, and neither of them was dissented from by the *Victory* until the last one, and the proper manœuvres to avoid the risk then created were promptly taken. But, if it were assumed that the first two-blast signal was blown when the *Victory* was half way between Craney Island and buoy No. 7, *the vessels were still half a mile apart, with room to correct the proposed erroneous course.* And if the *Victory* blew her second two blast signal inside of a half minute after the first, as her witnesses testified, and

the *Plymothian* upon hearing one of the two immediately acted on it, the failure to hear the other cannot be considered a fault under the circumstances." (Italics ours.)

That these decisions apply to the circumstances as between the *Alleghany* and the *Pomaron* with respect to when the Regulations became applicable is borne out by the following testimony of Chief Officer Westgarth (107–108, 109):

"Q. What did you think about the possibility of collision when you blew one blast? A. My thoughts at the time were that if he had blown one blast and altered his course to starboard, if he had ported his helm he could have gone under my stern." * * *

"Q. In order to get the matter quite plain on the record will you tell us when it was that in your judgment the circumstances had developed so that collision became unavoidable unless you did something? A. Really not until the *Alleghany* had given me two blasts on the whistle.

Q. Up to that time you had appreciated risk of collision from the time you blew your first whistle? A. Yes.

Q. But you thought it might have been avoided by the other vessel until she gave you two blasts? A. Yes.

Q. Then she was half a mile away from you? A. Yes.

Q. Bearing about three points as I understand you on your port bow? A. Yes.

Q. Then it became under the rule your duty to do something? A. Yes.

Q. It had not been your duty to do anything before that? A. No, sir."

Mr. Kindlund, an expert witness on behalf of the cargo claimants, testified (61, 62, 63):

"Q. If the *Alleghany* had starboarded of course there would have been no collision, would there? A. She did starboard, because the collision followed.

Q. I meant if she had ported? A. No, of course not."

* * * * * *

"Q. Then it was the starboarding of the *Alleghany* that brought about the collision, was it? A. Yes, sir."

These decisions and this testimony fairly establish, we submit, that Article 21 at the time the *Pomaron* ported did not apply to prohibit her doing so, in view of the actual facts and of the circumstances as they appeared to her chief officer. There was nothing in the porting that "defeated or baffled" the *Alleghany* "in the attempt to perform her duty in the emergency". *The Wenona*, 19 Wall. 41, 52. The *Alleghany* was wholly oblivious of any sense of duty. The ships were a mile apart, twice as far as were the colliding vessels in *The Banshee*, and in *The Victory and The Plymothian*, and further than in *The Bellanoch* and in *The Peter Benoit*, *supra*, and the *Alleghany* had ample opportunity to perform her duty and avoid collision by going under the *Pomaron's* stern. She was apprised of this duty by the *Pomaron's* one-blast signal. It was broad daylight, on the open ocean, with no other vessels to embarrass her movements. The *Pomaron* had as much right—and almost as much duty—to port as if the *Alleghany* had been a derelict. The *Alleghany* was as little affected by the porting as if she had been a derelict in fact. That the *Pomaron's* chief officer did not know for a certainty that the *Alleghany* had not observed the *Pomaron* and did not intend to take steps to keep out of the way is not material. As Mr. Justice Brown said in *The Umbria*, 166 U. S. 404, at pages 418–419:

"The case presented is not one where, if both vessels had stopped and reversed, the collision might have been avoided; but whether, under the facts as they subsequently appeared to be, the *Iberia* could be deemed in fault for a manœuvre which would have tended to avoid the collision rather than bring it about, by aiding her in keeping out of the way of the *Umbria*. * * * If the facts afterwards ascertained indicate that such manœuvre, under the circumstances of a particular case,

could not have subserved any useful purpose, the steamer ought not to be held in fault for the non-observance of the rule."

And in *The Victory and The Plymothian, supra,* Mr. Chief Justice Fuller said, at pages 425–426:

"However, the *Plymothian* did not see or hear that signal and cannot be held in fault as contributing to the collision because she failed to see or hear what would not have been followed by any change of course."

The *Pomaron*, of course, had the right to assume that the *Alleghany* would perform her duty and keep out of the way. *The Free State*, 91 U. S. 200; *The Victory and The Plymothian, supra*, at page 426. Such an assumption, however, must yield to the fact, and if the *Pomaron* made such a manœuvre as would not have been incorrect had the fact, as it subsequently appeared—namely, that the *Alleghany* did not intend to keep out of the way—been fully known, then she cannot be held at fault for not manœuvring in accordance with the assumption. In other words, although the situation may have been such as possibly to justify the *Pomaron* in navigating on the basis of a legal assumption, yet she is not to be condemned for not so navigating, for the good and sufficient reason, as it turned out, that the *Alleghany* was not navigating in accordance with the assumption, but on the contrary was not even aware of the *Pomaron's* existence.

It is not seen how the fact that the chief officer of the *Pomaron* did not take mathematically accurate bearings, adverted to by the Circuit Court of Appeals, has anything to do with the case. He knew at all times the position of the *Alleghany* and her bearing with sufficient accuracy for any purpose connected with the navigation of the

Pomaron. The only conceivable purpose for taking more accurate bearings would have been that they were to be used in a lawsuit, and the chief officer is hardly to be condemned for not preparing for such an eventuality. The Regulations do not prescribe that bearings be taken.

The situation which confronted the *Pomaron's* chief officer was not only the most difficult ever presented to a seaman, namely, that of the holding-on vessel when the burdened vessel shows no sign of yielding, but it was rendered doubly difficult by the apparent absence of any navigating officer upon the *Alleghany's* bridge. It would be strange indeed if under such circumstances there should be no basis for criticism whatever action the *Pomaron's* chief officer might take. Where, however, as in this case, the action taken not only did not deceive or embarrass the *Alleghany*, but was in fact best calculated to facilitate proper manœuvres of the *Alleghany* if she should finally endeavor to perform her duty, a court should be slow to find that a rule promulgated to promote safe navigation, even if applicable under the circumstances of this case, was violated.

(2) If Article 21 applied, was the *Pomaron's* porting such a change of course that it should be held a fault under the circumstances?

Let it be supposed that the porting was a fault. As such it was merely technical and tended to avert the disaster, wholly unlike the fault in *The Agra*, L. R. 1 P. C. 501, 505, where the *Elizabeth Jenkins* departed from her course "in a manner calculated to increase, and not to diminish or avoid danger". The *Pomaron's* porting did not create or increase danger of collision, but was well

calculated to lessen danger. Chief Officer Westgarth, on being asked why he ported, said (85):

"I had to give him a little more clearance; I expected him to come under my stern all the time, and they were getting too close as I thought to be safe."

It was away from rather than toward danger. Whether the *Alleghany* did the right thing and ported in order to go under the *Pomaron's* stern, or starboarded as she in fact did and went off to port, the effect of the porting was to give the *Alleghany* more room.

Under such circumstances porting should not be held a fault. In *The Umbria*, 166 U. S. 404, 412, Mr. Justice Brown said, at page 412:

"Upon these considerations, while we think it would have been more prudent in the *Iberia* not to have changed her course, yet in view of the fact that the whistle of the *Umbria* appeared to come from off her port bow, we should be unwilling to say that it was necessarily a fault on her part to port her helm two points, the effect of which would be to give the *Umbria* more room. It is possible that, under the peculiar circumstances, the *Iberia* had a right to assume that the *Umbria* was outward bound from New York, and pursuing a course substantially parallel to her own."

In *The Britannia*, 153 U. S. 130, the *Beaconsfield*, the holding-on vessel, was held in fault by the District Court and by this Court for stopping and backing across the bows of the *Britannia*. She was not held in fault, however, either by the District Court, by the Circuit Court or by this Court for porting. In the Circuit Court, 42 Fed. Rep. 67, 69, Lacombe, *C. J.*, found as a fact that:

"When the *Beaconsfield* [the holding-on vessel] blew her first whistle her wheel was put to port a little; and kept steady a-port; and under her slow engine she drew ahead, her head inclining a little towards the New York docks. * * * Thereupon those upon the *Beaconsfield*,

while still about four lengths from the *Britannic*, blew another single whistle, and, hearing no answer, put their wheel hard-a-port and stopped, and reversed full speed."

The Circuit Court exonerated the *Beaconsfield* for backing and did not hold her in fault for porting. This Court held her in fault for backing, but found no fault with her porting, although it was found that she did port. Mr. Justice Shiras said, at pages 136-137:

"It was next found that the *Beaconsfield*, when she blew her first whistle, put her helm to port a little and went on at a slow speed."

In Mr. Justice Brown's dissenting opinion the facts were carefully recited and the slight porting was not considered a change of course, pages 141–142.

Also in *The Franconia*, 2 P. D. 8, at pages 13-14, Bret, J., said in the Court of Appeal, with respect to porting under circumstances not essentially dissimilar to those in the case at bar:

"In the contrary, it was found in the court below, and it is the opinion of those who advise us here, and it is our opinion, that so far from breaking any rule of navigation at the time, the *Strathcona* did the very best thing she could do—she did yield until a point to the *Franconia*, and afterwards yielded more by putting her helm hard a port; and it is our opinion, and of those who advise us, that that is the best thing she could have done to avoid the effects of the wrong conduct of the *Franconia*. Therefore, the *Franconia* broke the rule; the *Strathcona* broke no rule."

It is difficult to understand how a manœuvre which, if a fault at all, did not prejudice but, on the contrary, actually aided the *Alleghany* to perform her duty and avoid collision, can be regarded other than negligible on the principle of *de minimis*. The *Franconia* has been condemned, however, because she did not keep a vessel which had not been

her and was totally unaware of her course, her wheel was put over "a spoke or two" to port (124), with the result that she changed her course about one point to starboard. The lower courts have seen fit to apply Article 21 with mathematical precision, and to condemn the *Pomaron* for this almost infinitesimal change in her course, disregarding entirely the actual circumstances which made this a prudent manœuvre. That those on board the *Alleghany* were at all times ignorant that the *Pomaron* had actually made any change of course and that, therefore, the navigation of the *Alleghany* was neither affected nor embarrassed are admitted facts. These facts have nevertheless been given no weight by the lower courts in determining the question of the *Pomaron's* liability. If the rules are to be applied with reasonable consideration of the purposes for which they were framed, without hypercritical accuracy and precision, but in consonance with the practical problems presented by the navigation of ships at sea, it is obvious that the *Pomaron* can in no substantial sense be considered a violator of the rule.

On this point the language of Lord Alverstone, *C. J.*, in *The Bellanoch*, *supra*, at page 182, is most convincing:

"I am therefore of opinion that even if there had been a breach of the rule on the part of the *Bellanoch* in not sounding her whistle it would be a purely technical objection, and that it had no possible effect on the collision. The master of the *Canning* admitted that he saw what the *Bellanoch* was doing all the time * * *".

On appeal to the House of Lords, Lord Loreburn, *L. C.*, said [1907] A. C. 269, 270-271:

"But I will assume, though I will not affirm, that the duty of the *Bellanoch* was to sound three short blasts on each and every of the three occasions when, according to the log, she reversed her engines. I think if she had

done so it could not in this case have affected the collision. The master of the *Canning* knew perfectly well what was the course of the *Bellanoch* and what her manœuvre was, and the whistle could not have told him anything he did not know already and could not have affected his action."

The conclusion above stated is the more appropriate because the gross fault of the *Alleghany* is sufficient by itself to account for the collision. In *The City of New York*, 147 U. S. 72, 85, Mr. Justice Brown said:

"Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

This doctrine was reaffirmed in *The Ludvig Holberg*, 157 U. S. 60, 71, and was restated by Mr. Justice Brown in *The Umbria*, 166 U. S. 404, 409, as follows:

"Indeed, so gross was the fault of *The Umbria* in this connection, that we should unhesitatingly apply the rule laid down in *The City of New York*, 147 U. S. 72, 85, and *The Ludvig Holberg*, 157 U. S. 60, 71, that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor."

In *The Victory and The Plymothian*, *supra*, at page 423, Mr. Chief Justice Fuller said:

"As between these vessels, the fault of the *Victory* being obvious and inexcusable, the evidence to establish fault on the part of the *Plymothian* must be clear and convincing in order to make a case for apportionment. The burden of proof is upon each vessel to establish fault on the part of the other."

The negligence of the *Alleghany* could not have been more gross. Although hard to believe, it is conceded that the *Alleghany*, a regular liner carrying both passengers and cargo, was permitted to steam blindly on for more than three-quarters of an hour with no one on lookout. Her first officer stated (142):

"I was on watch on the bridge and was engaged in taking observations. I had a free outlook, but, as I must admit, had for some time neglected to look to the starboard side where the other steamer came. * * * I know that it was my duty to keep out of the way. I omitted during a period of three-quarters of an hour to keep a lookout to starboard, and therefore never noticed the *Pomaron* crossing my course until the latter gave a signal to keep clear. * * * There was no lookout man at the time, and the steersman's lookout, to starboard, was blocked by a wind-screen. For a long period of time I neglected to keep a lookout, and therefore first saw the crossing steamer *Pomaron* only at the last moment. My excuse is that I was engaged in making observations."

The rule which these decisions illustrate should be applied in all cases of collision irrespective of whether the lesser fault be statutory or otherwise. Such would seem to be the effect of this Court's decision in *The Oregon*, 158 U. S. 186, 197–198. The rule was so applied by the Circuit Court of Appeals for the Fourth Circuit in *The Lord O'Neill*, 66 Fed. Rep. 77, 78, 80.

If it be suggested that this major and minor fault doctrine should not be applied in determining the liability of the *Pomaron* to the owners of cargo shipped on the *Alleghany* because wholly innocent parties, the answer must be that the owners of such cargo can recover only on showing that the *Pomaron* was guilty of negligence which caused the collision. In determining this question only the conduct of the respective ves-

sels can be considered. If the rule should be relaxed in favor of cargo owners then the vessel guilty of major fault would be benefited in many cases by an apportionment of the damages. If the libellants here are not able to secure their full damages from the owner of the *Alleghany* that is only because of the application of the limited liability statute. The situation is the same as in *The Victory and The Plymothian, supra*, where the major and minor fault doctrine was applied as against the owners of cargo. In that case the *Plymothian* had been held at fault by the lower Court and this Court indicated, at page 424, that the question of her fault was close.

Mr. Chief Justice Fuller there said, at pages 423–424:

"Apparently it is a hardship for the underwriters on the *Plymothian's* cargo to be compelled to bear a portion of their own loss, but if the *Plymothian* was free from fault, this is merely the result of the Limitation of Liability Acts, the value of the *Victory* not being sufficient to pay the entire damages sustained."

So in *The Ludvig Holberg, supra*, various doubts as to the propriety of that steamship's navigation were disposed of in her favor in view of the gross faults of the tug *Leonard Richards*, notwithstanding that the suits were brought by the owner of the barque *Quickstep* and the owner of her cargo, both wholly innocent parties. For failure to secure jurisdiction the tug was not a party to the suits. This Court expressly noticed the difficulty in which the libellants were thus placed, but was not led thereby to impose liability on the steamship by a modification of the major and minor fault doctrine. Mr. Justice Brown said, at page 71:

"We are by no means insensible of the fact that a practical injustice may have been done to the owners of

the *Quickstep* and her cargo in the litigation which is closed by this decision, by reason of the inability of the libellants to obtain service in this suit upon the tug."

If these considerations are sound that is an end of the case, and the decrees of the courts below must be reversed.

SECOND POINT

THIS COURT IN THE PENNSYLVANIA, 19 WALL. 125, MERELY HELD THAT A VIOLATION OF A STATUTE CREATES A PRESUMPTION OF CONTRIBUTORY FAULT WHICH CAN ONLY BE REBUTTED BY POSITIVE PROOF THAT THE FAULT DID NOT CONTRIBUTE TO THE DISASTER. THE LOWER COURTS ERRED, THEREFORE, IN PLACING UPON THE POMARON THE BURDEN OF SHOWING THAT HER INITIAL PORTING COULD NOT HAVE CONTRIBUTED TO THE COLLISION ENTIRELY IRRESPECTIVE OF WHETHER IT DID IN FACT CONTRIBUTE AND NOTWITHSTANDING THAT IT ACTUALLY DID NOT CONTRIBUTE.

The Pennsylvania was a case of collision in fog between the steamer *Pennsylvania* and the bark *Mary Troop*, which violated the statutory rules by ringing a bell while under way instead of blowing a horn. This was a misleading signal. This Court said, 19 Wall. 125, 136-7:

"But when, as in this case, a ship *at the time of a collision* is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. *In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been.* Such a rule is necessary to enforce obedience to the mandate of

the statute. In the case of *The Fenham*, the Lords of the Privy Council said, 'It is of the greatest possible importance, having regard to the admiralty regulations, and to the necessity of enforcing obedience to them, to lay down this rule; that if it is proved that any vessel has not shown lights, the burden lies on her to show that her non-compliance with the regulations was not the cause of the collision.' In some cases it is possible to show this with entire certainty. In others it cannot be. *The evidence in the present case leaves it uncertain whether if a foghorn had been blown on the bark, it would not have been heard sooner than the bell was heard, and thus earlier warning have been given to the steamer—seasonable warning to have enabled her to keep out of the way.*" (Italics ours.)

This is the language which led the District Court to hold that it was incumbent on the *Pomaron* to show that the collision would have happened even if she had not ported when a mile distant from the *Alleghany*, and this view was also adopted by the Circuit Court of Appeals.

A. The rule in the Pennsylvania.

The principle which *The Pennsylvania* lays down is primarily one of evidence. The actual violation of a statutory rule at the time of the collision raises a presumption that the fault was a contributory cause of the disaster. This presumption is not conclusive but is rebuttable. It can be rebutted, however, only by positive evidence that the fault did not contribute to the disaster. A mere showing of possibility or probability is not enough, but if the evidence clearly shows that the fault did not, in fact, contribute to the disaster, the contrary presumption is, of course, rebutted.

"In some cases it is possible to shows this with entire certainty. In others it cannot be" (page 136).

B. IT WAS IMPOSSIBLE FOR THE TROOP TO SHOW BY DIRECT EVIDENCE THAT HER FAULT "DID NOT" CONTRIBUTE, AND IN ORDER TO ESTABLISH NON-CONTRIBUTION IT BECAME NECESSARY FOR HER TO SHOW THAT HER FAULT "COULD NOT" HAVE CONTRIBUTED. IN OTHER WORDS, IT WAS NECESSARY TO NEGATIVE THE PRESUMPTION THAT HER FAULT DID CONTRIBUTE BY NEGATIVING THE VARIOUS POSSIBILITIES BY WHICH IT COULD HAVE CONTRIBUTED. IN THIS RESPECT THE POSITION OF THE TROOP WAS ENTIRELY DIFFERENT FROM THAT OF THE POMARON.

In *The Pennsylvania* it was obviously impossible to show that the failure of the *Troop* to blow her fog horn did not contribute to the disaster, because no one could say whether, if her horn had been blown it would not have been heard sooner than the bell was heard and thus earlier warning have been given to the steamer. If it could have been shown, however, that the *Pennsylvania* heard the *Troop's* bell from the very moment when it became her duty to sound her horn, she would have sustained the burden resting upon her of showing that her fault did not contribute to the disaster. Again, if the fact had been that the *Pennsylvania* was proceeding with her helm lashed and all on board below deck and asleep at the time of the collision, the presumption of contributory fault on the part of the *Troop* would have been successfully rebutted.

It was clearly not the intention of this Court in saying, "the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been" (page 136), to lay down a rule that something more was required than positive proof that the fault did not contribute. The words "but that it could not have been" were used in contrast with the character of the evidence offered in that case tending to show the possibility or probability that the fault of the *Troop* did not contribute to the

disaster. There was no positive evidence offered in that case that, in fact, the fault did not contribute to the disaster and there can be no reason to suppose that this Court intended to lay down a rule requiring something more than positive proof that, in fact, the fault did not contribute.

Thus the rule laid down is that a vessel guilty of statutory fault must show by the ordinary rules of proximate cause that her fault did not contribute, and not that it could not have contributed by any possibility irrespective of whether it did or did not contribute.

The only effect of the rule is to shift the burden of proof. Instead of the claimant being bound to prove that the ship's fault *did* contribute to the loss, as would otherwise be the case, the ship is bound to prove that her fault *did not* contribute. As thus understood and applied, the *Pennsylvania* rule serves every purpose which can be attributed either to Congress in enacting the Regulations, or to this Court in interpreting them. There is nothing in the statutes or in this Court's decisions to justify an inference that a ship which has departed from a Regulation should suffer a penalty in addition to assuming the burden of proof.

The language above quoted gives further internal evidence to support this conclusion, in that the Court there based its decision on *The Fenham*, L. R. 3 P. C. 212, from which it appears that the vessel in fault had the burden "to show that her non-compliance with the regulations *was not a cause of the collision.*" (Italics ours.)

It may not be unnatural that the language used by this Court, "in such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but

that it could not have been", should have been misunderstood. But it must be remembered that the Court was speaking of a situation where no certainty was possible as to whether the *Troop's* bell was heard on the *Pennsylvania* as soon as the required foghorn would have been. There was only room for speculation as to the possibility or probability. In this situation it necessarily would have been impossible to show that the failure to have a foghorn instead of a bell did not contribute. The only way to escape the presumption of contributory fault in such a case necessarily was to show that the fault could not have been one of the causes of the collision.

The circumstances of the *Pomaron* and the *Alleghany* differed utterly from those of the *Pennsylvania* and the *Troop*. In the latter case the collision was in thick fog and the *Pennsylvania* could not see the *Troop* until the collision was practically inevitable. A vessel could hardly be seen fifty feet away. She had no seasonable warning to enable her to keep out of the way. The *Troop* was in actual violation of the rules "at the time of collision". Her signal indicated that she was anchored, whereas she was under way. Her fault was an embarrassment up to the very last moment.

Thus considered, it would seem that *The Pennsylvania* is not an authority for the position taken by the District Court and the Circuit Court of Appeals and that the courts below have entirely misunderstood the rule laid down by that case. The District Judge's misconception of the rule resulted in what he himself designated "a very mechanical and arbitrary rule of law" (156).

C. The Supreme Judicial Court of Maine has shown that the rule is "did not" and not "could not".

Our conclusions with respect to the true doctrine of *The Pennsylvania* are supported by the Supreme Judicial Court of Maine in *Prince* v. *Eastern S. S. Co.* 109 Me. 395. hat court discussed interestingly and convincingly what it termed the "did not" and "could not" rules, and after analyzing this Court's decision in *The Pennsylvania* concluded that this Court did not intend to lay down the rule that it was necessary for a vessel which had violated a statutory rule to prove not only that the violation did not contribute, but, in addition, that it could not have contributed to the collision. At page 398 the Court said:

"The court said to the jury it was incumbent upon the plaintiff to show as a positive duty, that his failure did not contribute. That was the absolute end of the burden which could be imposed upon him. It was impossible for him to do more. To establish that a thing absolutely does not exist is the end of negative proof. But the instruction did not stop here. It required that the plaintiff must prove not only an absolute negative, but in some way go further, and, as the instruction says, prove that his failure not only did not, but, as an additional positive duty, could not have contributed to the injury. At this junction arises the perplexity to be solved by the jury."

The lower court in that case had based its charge on the cases of *The Livingstone*, 87 Fed. Rep. 769, and *The Lansdowne*, 105 Fed. Rep. 436, which purport to state the "could not" rule. With respect to these cases the Supreme Court of Maine said:

"It is then manifest that these two cases, which the Presiding Justice used as precedents for the language employed in his charge to the jury, and upon which, without a careful examination, he had a right to rely,

were erroneous interpretations of what might appear, upon a casual reading, to be the language of the rule laid down in the *Pennsylvania*, obviously the parent of these inapt expressions of the law."

That the Maine Court was correct in its criticism of the District Court's decision in *The Livingstone* is shown by the fact that that decision was reversed by the Circuit Court of Appeals for the Second Circuit, 113 Fed. Rep. 879.

What *The Pennsylvania* rule should be stated to be in effect is fairly indicated by the following language from the decision in the *Prince* case, at page 399:

"The misleading feature of the instruction is found in the phrase 'must go a step further'. It required that 'could not' must be proved in addition to 'did not'. We think the instruction should have been, that it was incumbent upon the plaintiff to establish: (1) that his failure to comply with the rules and regulations did not cause nor in any degree contribute to the collision; (2) that he might do this either by direct testimony or by any other facts and circumstances tending to prove that such failure could not have contributed; (3) and that, if he had shown that such failure could not have contributed, he had then produced sufficient evidence to rebut the presumption that it did contribute.

As before remarked, it was contended that the language of the instruction under consideration was in phraseology and effect substantially that employed by the federal courts in defining, what we may term, for the sake of brevity, the 'did not' and 'could not' rules. But we are unable to so construe it. We think a fair interpretation to be given the language employed by the federal courts in the various cases involving a consideration of these rules is in harmony with the foregoing conclusion as to what the instruction in the case at bar should have been."

D. Cases re-affirming the rule of The Pennsylvania considered.

The view above elaborated is borne out also by the fact that in the cases re-affirming the rule of *The Pennsylvania*

the rule has not been so stated as to justify an inference that this Court deemed it to be "could not" instead of "did not". Thus in *Richelieu Navigation Co.* v. *Boston Ins. Co.*, 136 U. S. 408, 422, Chief Justice Fuller said:

"In *The Pennsylvania*, 19 Wall. 125, it was held that where a vessel has committed a positive breach of statute, she must show not only that *probably* her fault did not contribute to the disaster, but that it could not have done so." (Italics ours.)

Also, in *Belden* v. *Chase*, 150 U. S. 674, 699, the Chief Justice said:

"And it is the settled rule in this court that when a vessel has committed a positive breach of statute, she must show not only that *probably* her fault did not contribute to the disaster, but that it could not have done so." (Italics ours.)

In the *Richelieu* case the Canadian steamer *Spartan* was navigating Canadian waters between Canadian ports about 2 A. M. June 19, 1883. She was equipped with a compass known to be defective, and was steaming full speed in thick fog with no lookout forward and was taking no soundings. While thus violating statutes applicable to her navigation she stranded on an island about seventeen miles off her supposed course.

In the *Belden* case the *Yosemite* and *Vanderbilt* were approaching each other head and head on the Hudson River at a combined speed of 25 miles per hour, about 9.30 P. M., July 14, 1882. The *Vanderbilt* saw the *Yosemite's* white light about a mile distant. They later exchanged single whistles which under the rules applicable required each vessel to pass on the port side of the other. Afterwards the *Vanderbilt* blew two whistles and changed her course so as to cross the *Yosemite's* bows, and a collision resulted. The language of the Chief Justice had par-

ticular application to the fault of the *Vanderbilt*, which was gross. The *Yosemite* was not at fault, this Court having held that she had the lights required by the Regulations.

Obviously neither the *Spartan* nor the *Vanderbilt* was in a position to show that her fault did not contribute to these respective disasters, and the statement of the rule in these cases therefore cannot be taken more broadly than its statement in *The Pennsylvania*.

The same observation applies to *The Martello*, 153 U. S. 64. There the barkentine *Freda A. Willey* was not provided with the mechanical foghorn required by the rules. She had sounded her tin foghorn, but only one blast had been heard upon the *Martello*, and this just a minute or two before she appeared in sight out of the fog, a quarter of a mile away. The vessels were thereafter *in extremis*. Mr. Justice Brown said, at pages 75-76, that it seemed not improbable that the absence of the mechanical foghorn contributed to the collision, and that it appeared probable that if the barkentine had been provided with a more powerful horn more than one blast would have been heard and the *Martello* thus apprised of her course and distance. Certainly it was entirely impossible for the barkentine to show with any degree of certainty that the absence of the mechanical foghorn *did not* contribute to the collision. The language of the opinion, like that in *The Pennsylvania*, must be read with this in view.

E. Other decisions of this Court and of the lower courts show that the rule is "did not" and not "could not".

Further than this, other decisions both before and after *The Pennsylvania* show that this Court did not intend to depart from the ordinary rules as to proximate cause and contributory fault in cases involving violation

of a statutory rule of navigation. Thus in *The Farragut*, 10 Wall. 334, the steamer *Farragut* was charged with negligent management whereby a canal boat in tow was forced against the pier of a bridge and with her cargo became a total loss. The steamer did not have a special lookout, as was required, inferentially, at least, by the act of April 29, 1864 (13 Stat. L. 61). It was apparent, however, that the presence of a special lookout would not have prevented the collision. Mr. Justice Bradley said, at page 338:

"But it would be against all reason to contend that the master or owners of a vessel should be made liable for the consequences of an accident by reason of not having a special lookout where the collision or loss could not have been guarded against by a lookout, or where it is clear that the absence of a lookout had nothing to do in causing it. Suppose that a sunken rock, dropped from a cargo of quarried stone, and unknown to the navigators of the channel, were the cause of the accident, could the presence of a lookout have the least tendency to guard against it? A hundred such instances might be suggested where the presence or absence of a lookout would have no influence whatever on the happening of the catastrophe. We are not to shut our eyes and to accept blindly an artificial rule which is to determine, in all cases, whether the navigator is liable to the charge of negligence in causing any loss or damage that may happen. A lookout is only one of the many precautions which a prudent navigator ought to provide; but it is not indispensable where, from the circumstances of the case, a lookout could not possibly be of any service."

In *The Fannie*, 11 Wall. 238, 243, Mr. Justice Strong said:

"We do not think it worth while to discuss the question whether the lookout on the schooner was sufficient. If it was not, it can make no difference, for the want of a proper lookout did not contribute to the disaster. If the schooner held her course, it was all that the steamer had a right to require, and, whether she had a proper lookout or not, it was her duty to do precisely what she did."

And in *The Blue Jacket*, 144 U. S. 371, 390, Mr. Justice Blatchford said:

"The provision of article 24 of the act of March 3, 1885, is that a vessel is not to be exonerated from the consequences of any neglect to keep a proper lookout. It does not say that a vessel shall, because of not keeping a proper lookout, be visited with the consequences of a collision. If the collision does not result as a consequence of neglecting to keep a proper lookout, the vessel is not thereby made responsible for the consequences of the collision, and the exemption of the tug necessarily results from the finding as a fact that the absence of the proper lookout in nowise contributed to the collision."

The rule has been understood as now contended for in various decisions of the lower courts. See *The St. Louis*, 98 Fed. Rep. 750; *The Clara*, 55 Fed. Rep. 1021, 1023; *The Britannia*, 34 Fed. Rep. 546, 557; *The Dentz*, 29 Fed. Rep. 525.

F. THE PENNSYLVANIA WAS INTENDED TO LAY DOWN THE RULE THEN IN FORCE IN ENGLAND, AS ILLUSTRATED BY THE FENHAM, UNDER WHICH IT WAS ONLY NECESSARY TO SHOW THAT AN INFRINGEMENT OF THE REGULATIONS WAS NOT THE CAUSE OF THE COLLISION.

The Pennsylvania was unquestionably intended by this Court to lay down the rule which at that time was established by statute in England. At page 135 this Court paraphrased the provisions of the British Merchant Shipping Act, and added: "Our own statute does not contain this provision expressed, but its meaning is the same". This British Act was 25 & 26 Vict. c. 63, s. 29, and it provided:

"If in any case of collision it appears to the court before which the case is tried that such collision *was occasioned by the non-observance of any regulation* made by or in pursuance of this act, the ship by which said regu-

lation has been infringed shall be held in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulation necessary." (Italics ours.)

Under this act a vessel guilty of a statutory violation needed only to show that her non-compliance with the regulations was not the cause of the collision. This appears clearly from the language of the *Fenham*, L. R. 3 P. C. 212, cited in this court's opinion in *The Pennsylvania*. In that case the Master of the Rolls said, at pages 215-216:

"There is one fact of great importance clearly established in this case, which is, that the Brig shewed no lights at all, or, at least, if she did shew a light, it was not till the collision was imminent; and therefore, in effect, for any practical purpose, she shewed no lights. * * * But, at the same time, it is of the greatest possible importance, having regard to the Admiralty Regulations, and to the necessity of enforcing obedience to them, to lay down this rule, that if it is proved that any vessel has not shewn lights, *the burden lies on her to shew that the non-compliance with the Regulations was not the cause of the collision.*" (Italics ours)

The Agra, L. R. 1 P. C. 501, referred to by the Courts below, is in no way contrary to *The Fenham*. Both cases were decided by the Privy Council, *The Agra* in 1867, and *The Fenham* in 1870, and the same British statute above quoted was in force at the time of both decisions. In *The Agra* both vessels were held at fault--the *Agra* for not sooner observing and getting out of the way of the *Elizabeth Jenkins*, and the *Elizabeth Jenkins* for departing from her course without sufficient necessity, and for departing from it in a manner calculated to increase and not to diminish or avoid danger (page 505). There is nothing to show that the *Agra* could have avoided the *Elizabeth Jenkins* after her faulty manœuvre, and it distinctly

appears that the manœuvre increased the danger. Certainly it was not shown that she did not contribute to the collision, and the Privy Council seems to have been of the opinion that the *Elizabeth Jenkins* did contribute, as shown by the following language at page 505:

"Looking to all the evidence in the case, their Lordships think—and it is also the opinion of the Nautical gentlemen by whom they are assisted—that the *Agra* would have passed free of the *Elizabeth Jenkins* had the latter maintained her course; and that even if the *Elizabeth Jenkins* had, from apprehension of danger, altered or interrupted her course, she should have done so by lulling up to the wind, thereby stopping her way, and mitigating, as far as possible, the effect of a collision, if a collision should take place."

There is nothing in *The Agra* therefore to justify an assertion that it states the "could not" rule. So far as it is an authority at all, it must be taken as an illustration of the "did not" rule. In *The Pennsylvania* this Court did not refer to *The Agra*, but based its decision on *The Fenham*.

That the British rule at the time *The Pennsylvania* was decided was the "did not" and not the "could not" rule is also shown by the discussion of the various British Acts in *The Khedive*, 5 App. Cas. 876, 891-894, and in *The Fanny M. Carvill*, 13 App. Cas. 455, 458-459. In *Morrison* v. *General Steam Navigation Co.*, 8 Ex. 733, 738, Pollock, *C. B.*, said, with respect to a similar provision in 14 & 15 Vict. c. 79, s. 28:

"And if it could be clearly made out that a vessel having no light had been run down by another, from sheer carelessness and negligence in not keeping a good lookout, we agree with Mr. Watson in thinking that in such a case the plaintiff would have had a right to compensation from the defendants."

G. THE ENGLISH RULE WAS LATER CHANGED BY STATUTE SO THAT MERE INFRINGEMENT OF A REGULATION PUT A VESSEL IN FAULT AND REQUIRED HER TO SHOW THAT THE INFRINGEMENT COULD NOT BY ANY POSSIBILITY HAVE CONTRIBUTED TO THE COLLISION. PROOF THAT THE INFRINGEMENT DID NOT CONTRIBUTE WAS IMMATERIAL.

After the decision in *The Fenham*, on which this Court based its decision in *The Pennsylvania*, the British rule was changed by 36 & 37 Vict. c. 85, s. 17, later becoming section 419 of the British Merchant Shipping Act of 1894. This provided:

"(4) Where in a case of collision it is proved to the Court before whom the case is tried, that any of the Collision Regulations *have been infringed*, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary." (Italics ours.)

By the statute in force at the time *The Fenham* was decided, quoted *supra*, pages 38-39, the collision must have been "*occasioned by the non-observance*" of the regulation infringed. By the statute last quoted *mere infringement* of the regulations required that the ship be deemed to be in fault.

This statute was so interpreted as to impose upon the offending vessel the burden of showing not merely that her fault did not cause the disaster, but that it could not by any possibility have contributed to it. This is shown by *The Fanny M. Carvill*, *supra*, where the Privy Council said that obviously under Section 419 of the Merchant Shipping Act already quoted mere proof that the infringement of the regulation did not in point of fact contribute to the collision was inadmissible, as the Legislature intended to obviate the necessity for determining

such questions of fact upon conflicting evidence. Literally construed, the statute

"would, in effect make the vessel guilty of the infringement a sort of outlaw of the seas, by depriving her of the right to recover, under any circumstances, more than half the damages to which, by the general law maritime she might become entitled" (13 App. Cas. 455, 459).

It was held, therefore, that if it could be proved that the violation of the regulation could not by any possibility have contributed to the collision, as was shown in that case, then even under the statute the vessel would not be held at fault. This was the law of the British courts from the passage of the statute in 1873 until it was repealed by Sec. 4 of the Maritime Conventions Act of 1911 (1 & 2 Geo. V. c. 57).

The history of the English legislation and cases decided thereunder is concisely stated in Marsden on Collisions, 6th Ed., pp. 39-42. The harshness of the later English statutes, subsequent to *The Pennsylvania*, may be gathered in part from the following quotation from page 42:

"The statute, therefore, imposes on a vessel that has infringed a regulation which is *prima facie* applicable to the case, the burden of showing affirmatively that such infringement could not, by possibility, have contributed to the collision. The court must therefore inquire into the facts, in order to ascertain whether the infringement could possibly have contributed to the collision, for it is not sufficient to find that it did not contribute."

See also *The Duke of Buccleuch* [1891] App. Cas. 310, and *The Corinthian* [1909] P. 260.

The effect of the repeal of this harsh statutory rule is stated by E. S. Roscoe and Helenus M. Robertson in an introductory note to "The Maritime Conventions Act, 1911", London, 1912, page 10, as follows:

"The act repeals the law, hitherto in force, that a ship in the navigation of which one of the Collision Regula-

tions has been infringed, shall be deemed to be in fault for a collision, 'unless it is shown to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary'. The effect of the removal of this provision will be that a ship will only be held to be in fault for a breach of the Collision Regulations if, in the opinion of the Court, such breach *did in fact* contribute to the collision, even although the circumstances did not make departure from the regulation in question necessary. It follows that any inquiry as to whether a breach of a regulation *might possibly* have contributed to a collision will be henceforth irrelevant, and the law will now be unquestionably clear."

H. THE COURTS BELOW IN EFFECT APPLIED THIS HARSH ENGLISH RULE, NOTWITHSTANDING THAT IT HAD NEVER BEEN ADOPTED IN THIS COUNTRY AND HAD BEEN REPEALED IN ENGLAND.

The District Court and the Circuit Court of Appeals in deciding as they did were guided not by the rule of *The Pennsylvania*, and not by the rule in force in England at the time *The Pennsylvania* was decided, but by a later English rule created by a subsequent act, the policy of which has never been accepted in this country, and which itself has now been abandoned in England. Their misconception of the rule laid down by *The Pennsylvania* cannot but have affected deeply their decision of this case. But, as we shall show in the next point, even under the rule applied by the lower courts, the *Pomaron* should have been exonerated.

THIRD POINT

THE PORTING OF THE POMARON NOT ONLY DID NOT CONTRIBUTE TO THE COLLISION, BUT BY NO POSSIBILITY COULD IT HAVE CONTRIBUTED. HER SUBSEQUENT MANŒUVRES WERE JUSTIFIABLE.

A. THE POMARON'S PORTING DID NOT AFFECT THE NAVIGATION OF THE ALLEGHANY.

When for the first time those on board the *Alleghany* became aware of the presence of the *Pomaron* the *Pomaron* was on a course slightly to starboard of that upon which she had been proceeding previously. The first officer of the *Alleghany* did not know that the *Pomaron* had in fact ported nor was he aware of any change in her course. Even if he had such knowledge certainly his action was in no way affected by it. His own statement is:

"I omitted during a period of about three-quarters of an hour to keep a lookout to starboard, and therefore never noticed the *Pomaron* crossing my course until the latter gave a signal to keep clear and had already approached so near that a collision was unavoidable. There was no lookout man at the time and the steersman's lookout, to starboard, was blocked by a wind screen. For a long period of time I neglected to keep a lookout, and therefore first saw the crossing steamer *Pomaron* only at the last moment" (142).

The statement in the log is:

"The first officer was engaged in taking observations of the sun and had just gone into the chart-house to note the measured latitude when he heard two short blasts of steam whistle. He ran out immediately and saw a steamer about five points from forward close by the starboard side crossing our course. Realizing that he could not clear her by porting, he gave two short whistles and

also put the helm hard-a-starboard. The engine telegraph was put twice full speed ahead, but the collision was unavoidable, as the steamer was too close to the *Alleghany*" (146–147).

From this it is apparent that the *Pomaron's* porting not only did not contribute, but could not by any possibility have contributed to the collision, except upon the theory that but for her porting she would not have been at the point where she was when the collision occurred. The Circuit Court of Appeals did not reach any different conclusion upon this question. The courts below apparently regarded as unnecessary any finding that the *Pomaron's* porting either did contribute or could have contributed to the collision under the ordinary rules of proximate cause.

B. THE LOWER COURTS HAVE ERRONEOUSLY APPLIED THE "BUT FOR" RULE.

Regarding this point as immaterial, the courts below considered only whether it had been shown that the collision would have occurred even had the *Pomaron* maintained her original course. The test thus applied was a purely mathematical one. This clearly appears from the District Judge's opinion (153–155). The only question which they considered important was whether the *Pomaron*, had she remained upon her original course, would have arrived at the point of intersection with the course of the *Alleghany* at the same instant with the *Alleghany*. Thus the lower courts adopted a test which this court distinctly disapproved in *The Umbria*, 166 U. S. 404, 420–421, where it was said:

"It is true that if she had stopped promptly, she might not have reached the point where the courses of the two steamers intersected; but it is equally true that if she had been going at a much greater speed than she was she

would have passed the point of intersection before the *Umbria* reached it. Manifestly this is not the proper test. The propriety of certain manœuvres cannot be determined by the chance that the two vessels may, or may not, reach the point of intersection *at the same time*, but by the question whether their speed can be stopped before their arrival at the point where their courses intersect."

Obviously such a test could be properly applied only if the ordinary rules of proximate cause were disregarded, and the so-called "but for" rule adopted. That the "but for" rule does not prevail in the Federal courts is indicated clearly in *Railroad Company* v. *Reeves*, 10 Wall, 176; *The Umbria, supra; The St. Louis*, 98 Fed. Rep. 750, and many other cases.

In applying the "but for" rule to the determination of the *Pomaron's* responsibility for the collision the Circuit Court of Appeals has apparently departed from principles which it has itself laid down in other cases.

In *Long Island R. R. Co.* v. *Killien*, 67 Fed. Rep. 365, 367, the Circuit Court of Appeals for the Second Circuit said:

"Only such vessels can invoke the violation of the statute as an actionable fault as have been prejudiced by it, either because their own movements have been embarrassed by the presence of the offending vessel, or because they have omitted to take some precaution in ignorance of her presence, which they might otherwise have avoided danger by adopting."

In *The Pocahontas*, 217 Fed. Rep. 135, the steamship *Maia* was charged with having been improperly anchored in the North River near the New Jersey shore, in such a way as to encroach on the fairway. Barges being towed by the steamtug *Pocahontas* came into collision with the

Maia. Section 15 of the act of March 3, 1899, 30 Stat. L. 1152, C. 425, provided:

"That it shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels."

The District Court for the Southern District of New York held that the *Maia's* conduct in so anchoring could not be entirely condoned. An appeal being taken, the Circuit Court of Appeals for the Second Circuit held that the *Maia* was not liable, and Coxe, *C. J.*, said, 235 Fed. Rep. 116, 117:

"We think there can be no doubt regarding the negligence of the *Pocahontas*, but it seems to us that the Judge was in error in holding the *Maia*. It is argued that she was anchored outside the anchorage ground and across the fairway, that she had no lookout and that she gave no warning signal indicating that she was off the anchorage ground. If the *locus in quo* had been a narrow, tortuous stream, there might be some reason for such contentions but we are dealing here with a river nearly a mile wide and navigable the entire distance from shore to shore. The anchorage regulations are not in evidence. We do not think the *Maia* was anchored off the anchorage ground but if she were partly off or wholly off, that did not justify other vessels in running into her. There was nothing to prevent the Cornell tugs from taking down their tow with perfect safety had they been properly handled; they had a quarter of a mile unobstructed water on the Jersey side and over half a mile on the New York side. The suggestion that there was danger of colliding with ascending tows on the New York side is not at all persuasive. If the helping tug had been sent back to aid the flotilla in passing the *Maia*, there would have been no collision.

"It seems to us that the tugs were clearly responsible for the collision and that the judgment against the *Maia* is based upon technical considerations too refined to be considered. The tugs had practically the entire river in which to pass the *Maia* and if they had been properly handled they would have passed without danger. They should be held solely responsible."

That a vessel's fault cannot be considered contributory to a collision merely because the result of her fault was to place her at the point of collision was held by the House of Lords in *Cayzer, Irvine & Co.* v. *Carron Co.*, 9 App. Cas. 873. There the *Clan Sinclair* violated rule 23 of the Thames rules which required that she should ease her engines and wait until the *Margaret* should pass clear. If the *Clan Sinclair* had obeyed the rule she would not have been at the point of collision when she was. Lord Blackburn said, at page 883:

"Then it is said that the collision was owing to the *Clan Sinclair* being where it was. Undoubtedly in one sense that is so. If the *Clan Sinclair* had been some hundred yards higher up the river, the fact which made it a matter of rashness for the *Margaret* to run where it did run would not have existed. But that is not a sufficient ground for saying that the fact of the *Clan Sinclair* being there was the cause of the accident. The *Clan Sinclair* would not have been there at the time when it was there if it had not been that that vessel did not ease and wait so soon perhaps as it ought to have done; but that was not the cause of the accident, but that the *Margaret*, knowing where the *Clan Sinclair* was, attempted to pass between it and the *Zephyr* where there was not sufficient room."

And at pages 886-887 Lord Watson said:

"I think that a vessel which is proved to have disregarded these precautions must accept the onus of shewing that the neglect of them did not contribute to any collision or damage which may have occurred at the time or subsequently. But then I am of opinion that in the present case the *Clan Sinclair* has discharged herself of that onus. I think it is made out by the evidence that nothing was either done or left undone by those who were navigating her which can reasonably be regarded as one of the causes of the collision. The result was to bring the vessel a good deal further down the Thames than she ought to have been; and if that conduct on the part of the *Clan Sinclair* had been such as to place the *Margaret* at this disadvantage, to throw her into difficulties and make it doubtful

what course she ought to pursue, then I could hardly have excused the *Clan Sinclair* from contribution to the collision in the present case. But the fact was not so. The new and wrong position into which I assume the *Clan Sinclair* had been brought by her neglect of the rule, was perfectly apparent to those on board the *Margaret*, apparent for a considerable time and a considerable distance – for a time and distance of such appreciable extent that they could with ordinary care have avoided the collision which ensued."

So in *The Bellanoch*, *supra*, the fact that if the *Bellanoch* had not put her engines at full speed astern without blowing three blasts the vessels might not have met at the point of collision was of no importance.

The same doctrine was also laid down by this Court in *The Ludvig Holberg*, *supra*, where it was said, at page 67:

"If she ran twenty miles an hour down to the Narrows, and was running dead slow at the time she first heard the tug's whistle, fault could not be imputed to her for her previous speed."

C. THE POMARON'S MANŒUVRE WAS HELPFUL TO ANY PROPER MANŒUVRE BY THE ALLEGHANY.

It is manifest that when the *Pomaron* ported and gave one blast a mile distant the *Alleghany* could easily have avoided collision either by slowing or stopping or reversing or by altering her course and passing astern of the *Pomaron*. This it was her duty to do and the *Pomaron* was justified in believing that she would do it. The alteration of the *Pomaron's* course one point gave the *Alleghany* more clearance. It was a better manœuvre than stopping or reversing, which would have thrown the *Pomaron* directly in front of the *Alleghany*, in case at the last moment she should port her helm, as it was her duty to do. It was better than starboarding, for that would have turned the

Pomaron directly towards the *Alleghany* and would have thwarted the latter in every proper effort, for if she should port the two vessels would come together, and if she should stop and reverse she would be directly across the *Pomaron's* bows. It enabled the *Alleghany* the more readily to avoid the *Pomaron* if inclined to do so. The chief officer of the *Pomaron* said that collision could have been avoided by the *Alleghany's* efforts up to the time the *Alleghany* starboarded when the vessels were half a mile apart (102, 109).

Instead of performing her duty, however, the *Alleghany* proceeded full speed on her course until the vessels had come within half a mile of each other, and then, instead of porting her helm so as to go under the *Pomaron's* stern, blew two blasts, starboarded her helm and kept on across the *Pomaron's* bows. Everything the *Alleghany* did from first to last was wrong. She had no officer on the bridge; she had no lookout; she was not aware of the *Pomaron's* presence and made no attempt to perform her duty to keep out of the *Pomaron's* way. When she did discover the *Pomaron* her disregard of rules continued. In starboarding she violated Article 19 of the Regulations, the starboard hand rule, and Article 22, which required that she should not cross ahead of the *Pomaron*. In continuing at full speed she violated Article 23. As to her starboarding, the District Judge said that the *Pomaron's* chief officer "was suddenly confronted with the very worst manœuvre which his adversary could execute" (155).

The situation as to contributory fault on the part of the *Pomaron* is, therefore, the same as that of the *Traverse* in the case of *The Livingstone*, 113 Fed. Rep. 879, decided by the Circuit Court of Appeals for the

Second Circuit. In that case the violation relied on was the absence of a red light on the *Traverse*. Lacombe, *C. J.*, said, at pages 882–883:

"He [the mate of the *Livingstone*] could see the *Traverse*, while her signal notified him as plainly as any lights would have done that she was directing her course to starboard. Indeed, when pressed upon cross-examination, this witness admitted that the one whistle heard by him gave him all the information needed, and that the absence of the red light made no difference. * * *

But it must be accepted that the position when the last signal sounded was one of safety, and that peril and disaster came thereafter only as the result of an amazing piece of stupidity in the navigation of the *Livingstone*. For this reason we cannot hold that failure by the *Traverse* to display a red light was a fault contributing to the disaster."

Mr. Kindlund, testifying for the cargo claimants, agreed on cross-examination that "it was the starboarding of the *Alleghany* that brought about the collision" (63).

D. Even under the later more stringent English statutory rule the Pomaron would not have been condemned.

In *The Fanny M. Carvill*, 13 App. Cas. 454, the American barque *Fanny M. Carvill* collided with the Swedish barque *Peru* off Beachy Head about 9:30 P. M., November 18, 1874. The *Peru* was the privileged vessel, and it was the duty of the *Fanny M. Carvill* to keep out of her way. The sailing rules applicable provided that the red and green side lights should be fitted with inboard screens projecting at least three feet forward from the lights, so as to prevent the lights from being seen across the bow (page 458). The screen of the *Peru* was about eleven inches short of the prescribed length. The Privy Council found that there was an infringement of the Regulation and said that it had not been shown that the circumstances of

the case made a departure from the Regulation necessary. On behalf of the *Fanny M. Carvill* it was contended that by reason of the defect in the *Peru's* screen her green light was visible to and seen by those on board the *Fanny M. Carvill* and gave rise to the inference that the *Peru* was bearing away, although it was her duty to keep her course. It was found that the *Peru* did in fact keep her course. There was some evidence that the *Peru's* green light might be seen across her bow.

The High Court of Admiralty "found as a fact that the green light of the *Peru* was not seen across the bow of the *Peru* by those on board the *Fanny M. Carvill*, and, therefore, could not have contributed to the collision" (page 457). The Privy Council concluded, at pages 457-458:

"That the green light of the *Peru* not only was not, but could not by possibility have been seen by those on board the other vessel; and, accordingly, that the defect in her screens neither did, nor could have contributed to the collision. This conclusion was probably intended to be implied, though it is not in terms expressed, in the finding of the Court of Admiralty. These being the facts of the case, it follows that the *Fanny M. Carvill*, which failed to keep out of the way of the *Peru*, must be pronounced solely to blame for the collision; unless by force of the 17th section of the Merchant Shipping Act, 1873 (36 & 37 Vict., c. 85), as construed in the recent case of *The Hibernia* (2 Asp. Mar. Cas. 454) the *Peru* is to be deemed to be also in fault; although the particular infringement of the sailing rules imputed to her neither did, nor could by possibility have contributed to the accident."

In the course of its discussion with respect to the effect of 36 & 37 Vict., c. 85, s. 17, the Privy Council said, at page 459:

"Their Lordships therefore conceive that, whatever be the true construction of the enactment in question

that which would take the case out of its operation by mere proof that the infringement of the regulation did not, in point of fact, contribute to the collision, is inadmissible. They conceive that the legislature intended at least to obviate the necessity for the determination of this question of fact (often a very nice one) upon conflicting evidence.

There remain, however, two other possible constructions. The first is that, on proof of an infringement of any of the regulations for preventing collisions, there arises, subject only to the qualification contained in the final clause of the section, an absolute presumption of culpability against the vessel guilty of such infringement, to which the Court is bound to give effect, whatever the nature of the infringement may be. The other is that the infringement must be one having some possible connection with the collision; or, in other words, that the presumption of culpability may be met by proof that the infringement could not by any possibility have contributed to the collision."

The second construction mentioned was adopted.

That because the *Alleghany* was not aware of the *Pomaron's* porting and could not by any possibility have been influenced by it, and that the porting could not by any possibility have contributed to the collision, is also established by *The Bellanoch* [1907] P. 170, affirmed by the House of Lords [1907] A. C. 269. This case was decided on facts which, as appears from the statement, *supra* (pp. 15–16), were the converse of those in *The Fanny M. Carvill*, *supra*. The master of the *Canning* saw and knew exactly what the *Bellanoch* was doing, namely, putting her engines full speed astern without blowing three blast signals. Lord Loreburn said, at pages 270–271:

" But I will assume, though I will not affirm, that the duty of the *Bellanoch* was to sound three short blasts on each and every of the three occasions when, according to the log, she reversed her engines. *I think if she had done so it could not in this case have affected the collision. The master of the Canning knew perfectly well what was the course of the Bellanoch and what her manœuvre was,*

and the whistle could not have told him anything he did not know already and could not have affected his action." (Italics ours.)

In the Court of Appeal Lord Alverstone, *L. J.*, said, at page 182:

"I am therefore of opinion that even if there had been a breach of the rule on the part of the *Bellanoch* in not sounding her whistle it would be a purely technical objection, and that it had no possible effect on the collision. The master of the *Canning* admitted that he saw what the *Bellanoch* was doing all the time * * *."

These two cases together bring out clearly the principle that a statutory violation cannot be held to have contributed by any possibility to the disaster in either of two events:

(*a*) The violation is unknown to the other vessel;

(*b*) The violation, even if known, does not in any way interfere with the other vessel's ability to take the necessary steps to avoid collision.

Applying this principle to the case of the *Pomaron* it is apparent that her porting if a fault could not by any possibility have contributed to the disaster, irrespective of whether the *Alleghany* was or was not aware of any change of course.

The force of this conclusion so far as it is supported by *The Bellanoch* is emphasized by the dissenting opinion of Fletcher-Moulton, *L. J.*, where he said, at page 191:

"The statutory blame makes the offending vessel in fault, unless the omission is of such a nature that it could not have possibly affected the course of events in any way, *and I doubt if we can say this in any case where the omission is not of a matter which would never have come to the knowledge of the other ship.*" (Italics ours.)

Inferentially, if in that case it could have been said that the reversing of the engines of the *Bellanoch* without blowing three blasts had not come to the knowledge of the *Canning*, Fletcher-Moulton, *L. J.*, would have agreed that it could not possibly have affected the collision.

Since the *Pomaron's* porting did not come to the knowledge of the *Alleghany*, and could not in any possible way have affected her navigation, it could not have contributed to the collision by any possibility. It follows inevitably that the *Pomaron* must be wholly exonerated, even under the lower court's interpretation of the rule in *The Pennsylvania.*

These decisions also show that the fault complained of must be one that has some possible connection with the accident, even where the extreme English statutory rule is applied. In *The Fanny M. Carvill, supra*, at pages 458–459, it is said:

"Again, it can hardly be denied, though the words perhaps admit of such contention, that the infringement proved must be one existing *at the time of the collision.* And if this be so, it seems but reasonable to infer that it must also be one *that has some possible connection with the accident.*" (Italics ours.)

E. The Pomaron's subsequent manœuvres were justifiable.

It remains to inquire whether the *Pomaron* neglected reasonable precautions to avoid the consequences of the *Alleghany's* wrongful manœuvres. No such manœuvres were, of course, to be anticipated. The *Pomaron* had the right to assume that the *Alleghany*, after being made aware of her presence would navigate properly. When the *Alleghany* starboarded and sought to cross the *Pomaron's* bow, the vessels were even then almost upon each other. In those difficult circumstances it seemed

best to the *Pomaron's* chief officer to hard a-port and reverse, and this he did. Westgarth testified (87):

"After I had rung full speed astern I saw the *Alleghany* - she was getting probably half a mile or a little less—she put her helm hard a-starboard and I could see she was swinging around, her stern was flying into us and of course when he put his helm hard-a-starboard, his stern swung around and caught us on the bow, about abreast of No. 3 hatch."

And further (102–103):

"Q. When the other vessel gave you two blasts on the whistle what did that indicate to you? A. That he was going to put his helm to starboard and try to cross ahead of me.

Q. He was half a mile off then? A. Yes.

Q. Or approximately so. A. Yes.

Q. Wasn't there plenty of time for you to starboard at that time and go under his stern? A. No.

Q. You could swing two points in half a mile? A. Not the way he was swinging around at the same time.

Q. His boat was not a very long boat, was it? A. No, sir, about 300 feet.

Q. Her stern would not have swung a great deal; she only changed her heading altogether about three points according to your estimate; if you were half a mile off, and had distinct notice that the other vessel was starboarding her helm; wasn't it within your power to avoid collision by starboarding your helm instead of porting it? A. I don't think so.

Q. Don't you think so now? A. No.

Q. If you had not begun to port before that you would not have continued when you got the two blast signals? A. I should never have starboarded.

Q. At the distance of half a mile? A. No, not after he answered my one blast signal like that and gave me two.

Q. Giving two notified he was going away from you? A. He couldn't in time though."

* * * * *

Q. Starboarding two points would have cleared her, wouldn't it? A. I hardly think it would; it might have.

Q. She was going ahead all the time? A. Yes; we were going ahead at that time as well.

Q. That would give you better steerage way? A. But it would bring us pretty close together before we got around."

His action was clearly *in extremis*. If he made a mistake his action cannot be charged as fault, and so the District Judge found (155). The *Pomaron's* action in reversing and hard a-porting having unquestionably been produced by the fault and mismanagement of the *Alleghany*, this decision accords with all the authorities. *The Elizabeth Jones*, 112 U. S. 514, 526; *The Maggie J. Smith*, 123 U. S. 349, 355-6; *The Blue Jacket*, 144 U. S. 371, 391-2. Whatever any fault of the *Pomaron* in porting might otherwise have amounted to, it is certain that it bore no legal relation to the *Pomaron's* efforts to avoid the *Alleghany's* wrongful manœuvres. In *The Ludvig Holbery*, *supra*, it was said at page 67 with respect to collision in fog:

"If she ran twenty miles an hour down to the Narrows, and was running dead slow at the time she first heard the tug's whistle, fault could not be imputed to her for her previous speed."

The case at bar is in many respects not unlike *The Huntsman*, 11 Asp. M. C. N. S. 606. There the *Huntsman*, the burdened vessel, failed to keep out of the way because the officer in charge of her bridge was diverted by signalling. The *Rameses*, the privileged vessel, kept her course and speed until it appeared that the *Huntsman* was taking no measures to keep out of the way. She then slowed her engines and sounded a long whistle to attract the attention of the *Huntsman*, and soon afterwards put her engines full speed astern and sounded three short blasts. The *Huntsman* continued on at high speed, apparently attempting to cross ahead of the *Rameses* and,

swinging under a starboard helm, struck the stem of the *Rameses*. Various charges of fault were made against the *Rameses*; with respect to which Bargrave Deane, *J.*, said, at pages 607-608:

"Now, it is said: 'Your fault was that you did stop when you ought not to have done so, and you never reversed and yet gave a misleading three-blast signal.'

"Upon this question as to altering her speed by a vessel whose duty it is to keep it under Article 21, it is almost impossible to lay down any fixed rule. Good seamanship requires that in any case a time may come when the course or speed or both of a stand-on ship may and ought to be altered. The difficulty in such a case is to decide at what exact time such alteration not only may be but ought to be made. It is impossible, mathematically speaking, to fix that time—various ingredients come into the matter. * * * The burden of taking action and departing from the rule is cast upon that officer, who has to determine when that point of departure ought to occur. *It must not be pressed too severely in any case. If the officer is carefully watching the movements of the other vessel and endeavoring to do his best to judge when the time shall arrive for him to act, it ought not to be made a complaint against him that he waited too long or he acted too soon.* * * * There was a manifest error of judgment as to the place in the intersecting courses where the vessels would relatively pass each other, with the result that instead of porting and passing under the stern of the *Rameses* the *Huntsman* kept her course and so did not keep clear of the *Rameses*. * * * In my opinion, if he (the officer in charge of the *Rameses*) had not slowed his engines in all probability he would have been cut in two by this big ship instead of hitting her amidships on the starboard side. I think the conduct of the officer of the *Rameses* was not blameworthy, but that he did the best he could in extremely difficult circumstances, and that the collision was far less serious than it would have been if he had kept his speed without slowing. * * * I think the *Huntsman* is alone to blame." (Italics ours.)

In *The Tempus* [1913] P. 166, the *Breiz Huel* and the *Tempus* were approaching on crossing courses, and the *Breiz Huel* sought at the last moment to cross ahead of

the *Tempus*, the privileged vessel. Sir Samuel Evans said, at page 171:

"It has been pointed out over and over again that the Court ought to be careful not to cast blame too readily upon a vessel which is placed in difficulty by another vessel. In the first place, the *Breiz Huel* gave no indication at all to the *Tempus* of what she was going to do, up to the very last. Therefore, the *Tempus* was left in doubt as to whether at the very last something would be done by the *Breiz Huel* to avoid collision. I have said that if the *Breiz Huel* had reversed her engines, about a minute or less before the collision, the collision would have been avoided, *and I do not think I ought to cast blame upon the Tempus if she expected, as no doubt she did, that up to that stage something would be done by the other vessel to carry out the obligations placed upon her.* The *Tempus*, in fact, almost immediately afterwards, did take action. She ported her helm to try to avoid the collision. She then, almost as one order, put her engines full speed astern and hard a-ported. If she had reversed a little earlier than she did, I think it is very doubtful whether the collision would have been avoided." (Italics ours.)

In *The Bywell Castle*, 4 P. D. 219, 226-227, Brett, *L. J.*, said:

"The next question is whether the *Bywell Castle* being put into that difficulty did what was wrong. It is said that she did so in two instances. But what is the wrong that the Court is bound to find she did? Not merely that she did a wrong thing, but that she was guilty of a want of that care or skill which she ought to have shewn under such difficult circumstances. I am clearly of opinion that when one ship, by her wrongful act, suddenly puts another ship into a position of difficulty of this kind, we cannot expect the same amount of skill as we should under other circumstances. The captains of ships are bound to shew such skill as persons of their position with ordinary nerve ought to shew under the circumstances. But any Court ought to make the very greatest allowance for a captain or pilot suddenly put into such difficult circumstances; and the Court ought not, in fairness and justice to him, to require perfect nerve and presence of mind, enabling him to do the best thing possible. * * * We are, however, advised that

the order to put the helm hard a-port had no practical effect as to the collision. If that be so, of course it follows that the last wrongful act of the *Princess Alice* was done so near to the other that it was impossible by any manœuvre to avoid the collision. If the fact of ordering the helm hard a-port had no effect upon the collision, it is immaterial whether it was given or not. Even if it had an effect and was wrong, we have come to the conclusion that the captain of the *Bywell Castle* was suddenly put into an extremely difficult position, and assuming that a wrong order was given, that it ought not under the circumstances to be attributed to him as a thing done with such want of nerve and skill as entitles us to say that by negligence and want of skill the *Bywell Castle* contributed to the accident."

In *The Bruxellesville*, reported in the Sh ng Gazette for November 23, 1907, the *Veritas*, the l on vessel, changed her course. Bucknill, *J.*, said·

"I and those who are assisting m conclusion that his judgment [the maste s] was a correct one, and that, if he had not something, in all probability he would have hit the er vessel. * * * This Article 21 is the most difficult of all the Regulations to understand and to obey. If a man of ordinary intelligence, being a competent person—because, of course, he must be both a man of ordinary intelligence and competent to navigate the ship—does that which he believes to be the right thing, and which turns out to be the right thing in this sense, that if he had not done something the collision would have taken place almost certainly by the wrongdoing of the other ship—and although in the words of Lord Justice Vaughan Williams, Rules are not intended to annihilate intelligence or obviate the use of intelligence if the exercise of intelligence will avoid the collision –if he is a competent man, you must not say that in the circumstances something better might have been done, perhaps, provided you were satisfied he did not act until he was satisfied that the collision could not then be avoided by the action of the wrongdoing ship alone. I cannot suggest anything that this man might have done, and the result at which I arrive is that the *Bruxellesville* is alone to blame."

In the Circuit Court of Appeals the libellants sought to show that the *Alleghany* did not starboard, and thereby inferentially to show that the *Pomaron's* final manœuvres were not *in extremis*. This attempt was based on a statement of the *Alleghany's* chief officer that no commands were given to her steersman (143). The effect of this statement is wholly overcome, however, by the entry in the *Alleghany's* log which proves that she did starboard (146–147). Moreover it is conceded that she blew two blasts, and this meant that she was starboarding. No one testified that the *Alleghany* did not starboard, and the entry in her log is confirmed by the positive testimony of the *Pomaron's* chief officer and other witnesses.

Chief Officer Westgarth said (87):

"After I had rung full speed astern I saw the *Alleghany*—she was getting probably half a mile or a little less—she put her helm hard a-starboard and I could see she was swinging around, her stern was flying into us and of course when he put his helm hard a-starboard his stern swung around and caught us on the bow, about abreast of No. 3 hatch."

John Hyslop, the apprentice who was at the *Pomaron's* wheel, testified (125):

"Q. Do you know what the *Alleghany* did? A. She starboarded her helm.

Q. How do you know? A. Because you see them swinging to port; that was after she blew the two blasts; she didn't alter her course at all before that."

George Hogg, the *Pomaron's* boatswain, testified (130):

"Q. Do you know what the other boat did; do you know whether she changed her course? A. She altered her course; yes, sir.

Q. Under what helm? A. Starboard helm.

Q. How do you know? A. Her quarter swung across our bow.

Q. And the two vessels came together how? A. The *Alleghany's* starboard side came across our bow.

Q. Did she stop her way at all? A. No."

LAST POINT

THE DECREE OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED, WITH COSTS, AND THE CAUSE REMANDED TO THE DISTRICT COURT WITH DIRECTIONS TO ENTER A DECREE DISMISSING EACH OF THE LIBELS, WITH COSTS.

December, 1916.

BURLINGHAM, MONTGOMERY & BEECHER
Proctors for Petitioner

NORMAN B. BEECHER
CHARLES C. BURLINGHAM
ROSCOE H. HUPPER
Of Counsel

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1916.

FURNESS, WITHY & COMPANY, LIMITED, Petitioner, AGAINST YANG-TSZE INSURANCE ASSOCIATION, LIMITED, *et al.*, Respondents.	No. 106.

BRIEF FOR RESPONDENTS.

STATEMENT.

This cause comes before the Court on a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, issued June 16, 1915, to review decisions adverse to the petitioner as owner of the steamship *Pomaron.*

The final decision of the Circuit Court of Appeals for the Second Circuit was entered June 23, 1914, in pursuance of its opinion dated June 10, 1914, pp. 168-176, and which affirmed the decision of the District Court, Learned Hand, D. J. Pp. 147-156. The former opinion is reported in 215 Fed. Rep. 859; the latter is not reported.

A petition for a writ of certiorari had been presented previously herein, on April 12, 1915, Docket Number 921, October Term, 1914, and had been denied by this Court on April 19, 1915.

The renewal of the application for the writ

was based on the grounds that the questions involved in this case were identical to those presented by the petition of Olaf Lie, Number 110, October Term, 1916, writ of certiorari issued May 12, 1915. The latter case involves the construction of the Collision Rules applicable to navigation in a fog, while the present case arose in clear weather and under Articles 19 and 21, International Rules, requiring the starboard hand vessel (*Pomaron*) in a crossing situation to keep her course and speed.

On October 5, 1914, a petition for limitation of its liability had been filed by this petitioner; and on April 22, 1915, after denial of the first petition for a writ of certiorari, an agreement of settlement and compromise among the parties to the issues herein was entered in the limitation proceedings. A motion to dismiss the present writ is now before this Court. A separate brief in support of the motion has been presented for the consideration of the Court.

The litigation grew out of the collision between the British steamship *Pomaron*, and the German steamship *Alleghany*, which occurred at sea on February 2, 1912, and which resulted in the sinking of the *Alleghany* and her total loss, with all her cargo.

The respondents were owners or insurers of cargo shipped on the *Alleghany*. The original libels proceeded against the owners of the two vessels jointly. The owner of the *Alleghany*, Hamburg Amerikanische Packetfahrt Actien-Gesellschaft, filed a peition for limitation of its liability and surrended the amount of its pending freight for the voyage. Pp. 51-52. The fifteen suits against the petitioner, as owner of the *Pomaron*, were consolidated and tried together.

The established facts rest almost wholly on the testimony of those on board the *Pomaron,* six witnesses from that vessel having been examined.

Short statements of the master and first officer of the *Alleghany* were admitted in evidence by stipulation, p. 142, as was a translation of the *Alleghany's* log book. Pp. 144-147.

The *Pomaron's* log book extracts appear on pp. 78, 90, 91 and 117.

The circumstances attending the collision are as follows:

The *Pomaron,* with a cargo, was bound across the Atlantic from Baltimore and the Chesapeake Capes to Leith. The *Alleghany* was bound from New York to the West Indies and South America.

The weather was fine and clear. Pp. 88-89.

There is not any dispute as to the courses and speeds.

Courses. The course of the *Alleghany* was South 2° West true. This course is confirmed by the *Alleghany's* position at departure off Barnegat to her position at collision, from her log book. Pp. 52, 144-145.

The course of the *Pomaron* was East by North by her compass, or East by North ¼ North magnetic, p. 84, which would be East 19° North true, applying the chart variation of 5° Westerly. The two courses protracted would intersect at an angle of 111 degrees, the *Pomaron* being to the southward and westward of the *Alleghany* and on the latter's starboard hand as they approached each other. These respective courses had been maintained for several hours prior to the collision. P. 84.

Speeds. The speed of the *Pomaron* was nine knots. Pp. 115, 139. The speed of the *Alleghany* was somewhat greater, being about 11½ knots. According to the *Alleghany's* log book, the entry for the run during the morning watch of four hours preceding the collision was 46 miles. P. 144. The average hourly speed from the data given in the *Alleghany's* log book for her departure off Barnegat the preceding night, to her position at collision, would give a fraction greater than 11½, or about 11.8 knots. The officer on watch on the *Pomaron* assumed that the *Alleghany* was making about 13 knots an hour. Pp. 104, 111, 139.

The *Alleghany* was first sighted by the *Pomaron* on the port hand of the latter when about ten or twelve miles off, and three-quarters of an hour before the collision. Pp. 84, 90, 92, 139. The *Pomaron* was not sighted by the watch officer on the *Alleghany* nor by the wheelman, probably until shortly before the collision. P. 142.

Both steamers maintained their courses and speeds until approximately a mile apart, when the *Poramon* altered course under a port helm and sounded one blast on her whistle. Pp. 85, 92, 124, 126. The time of this change of course is given as 11:14 a. m., in the *Pomaron's* log book. The bearing of the *Alleghany* is also entered as about North East. *Exhibit 7*; pp. 90, 91, 139.

If the *Alleghany* bore North East, since the *Pomaron* was on the compass course East by North, the *Alleghany* was then three (3) points or 33¾ degrees on the *Pomaron's* port bow. As the *Alleghany* was making a speed at least two and a half knots greater than that of the *Pomaron*, it follows that the *Alleghany* would have

crossed the bows of the *Pomaron* before the latter could have reached the line of the *Alleghany's* course. In other words, the vessels would have passed each other safely, if neither had made any change in course or speed. *Post,* p. 35.

According to the log book entry, the *Pomaron* ran three (3) minutes, under the port helm, when, at 11:17, the *Alleghany* having sounded two blasts, the *Pomaron's* helm was put hard-aport and the engines were stopped and reversed. P. 86.

The officer in charge of the *Pomaron's* navigation, Westgarth, testified that the *Pomaron* went off her course "about a point; went off to about East" under the first porting, p. 85; and that she swung about three points under both helm movements, p. 97; so that the *Pomaron* was heading East South East at the moment of collision. Pp. 100-101; *Yang-Tsze Exhibit B.* These helm movements turned the course of the *Pomaron* towards the direction in which the *Alleghany* was proceeding, viz., to the Southward, although, when the second helm movement was made, it was known that the *Alleghany* intended to continue passing ahead of the *Pomaron,* as was indicated by the former's two-blast signal.

The testimony of the wheelman, Hyslop, shows that the *Pomaron* must have been swinging continuously to the southward from the time the first order to port the helm was given up to the time of the collision. He testified as follows at page 124:

"Q. What was the order you got? A. He blew one blast and gave me an order to port a little.

"Q. What were his words to you? A. Port a little.

"Q. Did you? A. Yes, I gave her a stroke or two and she went over about a point.

"Q. Did you steady the helm or keep it over? A. *I had it to port all the time.*

"Q. You say she went over a point; if you had your helm to port all the time, why didn't she go over more? A. I mean before he gave me the order to hard-a-port.

"Q. You said the order given to you by the mate was port a little and that you ported a point? A. Yes.

"Q. Did you steady your helm after that? A. *No, I had it to port all the time,* and she went over a point before he gave me the order hard-a-port.

"Q. She had made a point when he gave the order hard-a-port? A. Yes."

The time of the collision as recorded in the *Pomaron's* log book was 11:21 a. m. *Exhibit 7,* pp. 90, 92. As the time of initiating the movement was stated at 11:14 a. m., the *Pomaron's* helm movement must have been continuously operative during *seven minutes* preceding the collision.

An effort was made later to repudiate the log entry, and to reduce the time that elapsed from the first porting to the second porting, thereby decreasing the interval during which the port helm must have been effective. P. 106. However, the log entry was a statement of a fact based on the officer's judgment formed at the time, and is more reliable than his testimony given after doubts as to the accuracy of the entries were suggested by the captain, who did not have any personal knowledge of the times. Pp. 96, 97, 106.

The officer who made the log entry, and who was solely in charge of the *Pomaron's* navigation at the time, and responsible for her movements, explicitly admitted on cross-examination that he departed from the rule requiring him to hold his course. He testified at page 109:

"Q. You stated you departed from the rule which required you to keep your course? A. Yes.

"Q. Having the other vessel on your port bow? A. Yes."

The *Pomaron's* change of course is the essential feature of the case, and will be discussed more fully in the following text.

During the time the *Pomaron* was swinging to the Southward under her port helm, the *Alleghany* was proceeding on her original course and making for the locality towards which the *Pomaron* was being directed. According to the statement made by First Officer Kurt Morens, of the *Alleghany,* who was on watch, "no commands were given the steersman of the *Alleghany.*" P. 142. Chief Officer Westgarth, of the *Pomaron,* maintains that the *Alleghany's* helm was put hard astarboard, p. 87, and the log of the *Alleghany* has an entry to this effect, apparently; but it seems probable that such a change of course, if made, was without effect on the collision, one way or the other.

If the *Alleghany* was heading South East by South at the moment of collision, as shown on Westgarth's diagram, Exhibit B, pp. 100-101, her change of course was about three points or 33¾ degrees. The angle between the two vessels at collision, as stated by Westgarth, was about 45 degrees. P. 87. Assuming that the *Pomaron's* heading is correctly shown, viz., East South East, the *Alleghany's* heading, to make a 45° angle between the two headings, must have been South South East; that is, the *Alleghany* would have changed course only two points instead of three. The petitioner's answer, pp. 11 and 12, alleges that the *Alleghany* "kept on at "full speed across the *Pomaron's* bows, *at the*

"last moment swinging apparently under a star-"board helm." p. 12, and the District Judge concluded that "the *Alleghany's* stern was still on "her original course when the collision oc-"curred." P. 153.

It seems clearly established that, whatever may have been the faults of the *Alleghany* by way of omissions under the rules, there was not any positive act in her movements that directly caused the collision; and, on the other hand, that the *Pomaron* was the active agency in placing herself in a position that resulted in a collision.

The *Alleghany* sank, with all her cargo, at about 3:20 p. m. on the day of the collision, in deep water, within a few miles of the place of collision. Pp. 71-72, 91-92, 146.

There is not any dispute as to the fault of the *Alleghany*. Her defective lookout was the cause of her failure to take seasonable precautions to avoid the collision by keeping clear of the *Pomaron*, thus constituting a failure to comply with Article 19 of the International Rules, viz.:

"When two steam-vessels are crossing, so as to involve risk of collision, the vessel [*Alleghany*] which has the other on her own starboard side shall keep out of the way of the other."

The question now raised concerns the *Pomaron's* navigation, and the effect of her admitted departure from the opposing navigatory rule, Article 21 of the International Rules, viz.:

"Where, by any of these rules, one of the two vessels is to keep out of the way, the other [*Pomaron*] shall keep her course and speed." [Italics mine.]

Apart from the failure of the two vessels to observe the ordinary rules governing the mere fact

of a collision of the character occurring, it did not seem possible, even under the most favorable circumstances, that the vessels could have been seen within a minute or two of the time when they would have come in contact. Under the most favorable conditions for navigation, there is a strong presumption of fault against both vessels. The *Pomeroy* was a well-appointed steamer, and her officers were competent men. The circumstances of the collision occurring under such conditions was communicated by the [illegible] Captain, which made in its opinion [illegible].

"The loss of property in this case [illegible] sought was [illegible] broad daylight, and with no other vessels [illegible] with navigation. The two vessels [illegible] steamers [illegible] therefore, and [illegible] more easily than any other kind of vessels. They were in plain sight of each other [illegible] apart. They nevertheless came into collision and with such force that one of them sank in a few hours carrying down with her the entire cargo. It is difficult to see how such a happening [illegible] vessels were [illegible] to exercise reasonable care. Plain common sense constrains one to such a conclusion. [illegible] under such conditions can [illegible] the closest scrutiny of the navigation of both vessels it can be discovered that [illegible] from all culpable blame."

The District Judge made a most careful and painstaking analysis of the evidence and of the probabilities; and, after applying the test of mathematics to the situation from every possible angle, the Judge arrived at the conclusion that the change of course of the *Pomeroy* was premature, and that it could not be shown that the *Pomeroy*'s fault in this respect did not contribute to the collision. P. 154.

Similarly, the Circuit Court of Appeals, after an equally careful consideration of the facts and the law, arrived at the conclusion that the *Pomaron* had not sustained the burden of proof resting on her to show that the infraction of the rule was not a contributing cause of the collision. P. 171. Although the Court did not discuss possible distinctions of the "did not" and "could not" rules growing out of the interpretation of the doctrine of *The Pennsylvania,* 19 Wall. 125, and now raised by the petitioner, it seems clear that the Court's decision was based on the "did not" rule, as appears from the statement in its opinion:

"Concluding, then, as we have, that the *Pomaron* was in fault, it remains to inquire whether the fault contributed to the collision. For, if the fault had nothing to do with the collision, it may be disregarded." P. 171.

In its petition for writ of certiorari, the petitioner states, at page 2:

"The principal question is whether under this Court's decision in *The Pennsylvania,* 19 Wall. 125, a privileged vessel, which before a collision with a burdened vessel ported her helm in violation (*prima facie,* at least) of Article 21 of the International Regulations may be held responsible for the collision, notwithstanding that it appears as matter of law that the porting was no part of the cause of the collision, and notwithstanding also that the manifest and primary cause of the collision was the gross and unparalleled negligence of the burdened vessel in failing to keep any lookout whatever in the direction of the privileged vessel and not seeing her until collision was unavoidable."

Unless the rule of *The Pennsylvania* is to be divested of all meaning and force, it is difficult

to comprehend how it can appear that an infraction of a statutory rule of navigation is "no part of the cause of the collision" as a matter of law, when it cannot be shown that the infraction of the rule was not a contributing cause in fact.

We contend that the inquiry here is a comparatively simple one; viz., has the *Pomaron*, which admittedly departed from a statutory rule of navigation, shown that the departure from the rule did not contribute to the collision? If not, the *Pomaron* must bear the consequences.

FIRST POINT.

THE CHANGE OF COURSE OF THE "POMARON" WAS A BREACH OF THE STATUTORY OBLIGATION TO KEEP HER COURSE AND SPEED AS THE STARBOARD HAND VESSEL IN A CROSSING SITUATION UNDER ARTICLE 21, INTERNATIONAL RULES.

It is admitted that the *Pomaron* was the starboard hand vessel with respect to the *Alleghany*, whose course was crossing that of the *Pomaron*, and that, in this situation, the *Pomaron* sounded a one-blast signal and ported her helm, directing her course to starboard, when the two vessels were separated by a distance which the witnesses estimated at about a mile. *Griffiths*, pp. 76-77; *Westgarth*, pp. 85-86, 95-96, 98, 112, 139; *Hyslop*, pp. 124, 126-127; *Hogg*, p. 129.

The testimony of Westgarth, the officer who was conducting the *Pomaron's* navigation at this time, is as follows:

When the *Alleghany* got about a mile away "I thought he was getting pretty close and it was time for him to do something." * * * "So

I thought I would give him a blast on the whistle to attract his attention; wake him up a bit, *and I also ordered the helmsman to port a little.*" The helmsman obeyed the order, "she went off the course about a point; went off to about east." "Q. Why did you port? A. I had to give him a little more clearance." P. 85.

"About a minute or so after I gave him the blast, he answered and gave me two blasts." "I rang the engine full speed astern as soon as he gave me two blasts and reversed the engine." P. 86. "From the time I blew my first whistle until I gave the order to reverse, it would be somewhere about a minute." "From the time I reversed my engine until the two vessels came together was about four minutes." P. 87.

A scrap log was kept in the wheelhouse of the *Pomaron*. He made an entry in it about one o'clock following the collision, and wrote the remainder of the entry about seven o'clock that night. P. 89. The entry thus written stated as follows:

"10.35 A. M.: Sighted steamer on port bow steering to southward, bearing about northeast.

"11.14 A. M.: Steamer getting close and keeping his course and speed, so in order to try and avoid collision I gave one blast of whistle and altered my course to starboard, other steamer answered by two blasts on whistle.

"11.17 A. M.: Stop and full speed astern.

"11.21 A. M.: Collided with steamer *Alleghany* port bow striking him abaft bridge deck on starboard side." P. 92.

The witness claimed, on direct examination, that he did not take the time of these things, as he had no watch or clock by him. P. 86.

After the log was put in evidence the witness

challenged the accuracy of the entries. P. 93. On cross-examination, he admitted that he had intended to make correct entries, and they were correct as he remembered them. P. 94. His first doubts as to the correctness of the time were suggested by the captain a day or two after the steamer arrived back in Newport News. Pp. 96, 97. The collision occurred on February 2. The conversation referred to probably occurred on Febuary 4th or 5th.

Notwithstanding the doubt later alleged to have been created by the captain, the witness on March 12, 1912, made a deposition before the officers of the Board of Trade, in regard to the accident, at Leith, Scotland, in which he again reiterated the statement as to the time of sounding the one blast signal [and making the alteration of course], viz., "at 11.14 A. M." Pp. 139-140.

It appears that the witness compared times with the engineer, who told him the engines were going astern four minutes. *Post*, p. 15. The time of the collision was also confirmed by the fact that it immediately followed the ringing of the ship's bell which called the watch to dinner at 11.20. Pp. 97-98.

Obviously the reason the captain wanted to alter the account given in the log was that as the *Pomaron's* speed was 9 knots, or about 900 feet a minute, he would have difficulty in explaining a change of course three minutes before the situation became such as to require the stopping and backing of the engines. It would have meant that the first porting occurred nearly a half mile back of the point where the risk of collision became such that the *Pomaron* was obliged to take measures to avoid collision.

Westgarth further testified:

"My best judgment is that the ships were a half mile apart when I began to back." P. 100. The witness apparently concedes that, if he had stopped instead of porting, at the time when he first ported, the collision would have been avoided, but adds: "but then it was not my place to"; p. 101. But, if it was not his place to stop at that time, obviously it was not his place to port.

"The steamer was half a mile off when she gave me two blasts." P. 102. "When the *Alleghany* blew two blasts, she was probably about four points, three or four points on our bow. She was a faster vessel than we were." "She was only three points to begin with." P. 103.

Hyslop, the wheelman, testified that he first saw the *Alleghany* between four and five points on the port bow, p. 101, ten or twelve miles away. Pp. 123-124. "She would probably be about a mile away when I got the first order from the Chief Officer." "His order was port a little. I gave her a spoke or two and she went over about a point." "I had it to port all the time." "After I had gone over a point, he gave me the order 'hard-a-port' and gave the engines full speed astern." "That was when the *Alleghany* blew two blasts, less than a minute after our one blast." P. 124. The *Pomaron* was nearing about E S E at collision. P. 125. The bearing was just estimated. He did not take it on the compass. Pp. 125-126. He did not observe the ship's heading at the time he got the order hard-aport. P. 127. "The ship was a mile away as near as I can tell when I got the order to port." Pp. 126-127. It would be as much as that. "It was as much as a half mile when I got the order hard-a-port." The ship swings very slowly with the helm ported four spokes. P. 127.

Hogg, boatswain, also "saw the *Alleghany* three or four points on port bow when I came on deck after breakfast; nine or ten miles away." "She was about a mile away when the Chief Officer blew one blast on the whistle." P. 129. "The *Alleghany* blew two about a minute after we blew." Pp. 129-130. The *Alleghany* was a half to three-fourths of a mile away when she blew two whistles. P. 131.

The testimony of Johnson, the chief engineer of the *Pomaron,* is positive to the effect that he looked at the engine-room clock when the signals to stop and go full speed astern were received, and also when the shock of collision was felt; and that the elapsed time was four minutes, viz., from 11.20 to 11.24 a. m. Pp. 116-117.

The District Judge was of the opinion that the interval of seven minutes from the first change of course, until the collision, was too great, and he adduced from circumstantial evidence and the probabilities a conclusion that the total interval was less than three minutes, although he stated "It may be thought that this does violence to the "testimony." P. 152.

Despite his conclusions in this respect, and his obvious inclination to consider the situation in the most favorable light for the *Pomaron,* he decided that the initial change of course was made prematurely and unjustifiably. The Judge stated in his opinion, p. 156:

"The time had not yet come when he needed to act alone, and his action was not *in extremis;* it was to assist the other vessel to accomplish her duty."

The admitted distance apart of the two vessels when the *Pomaron* ported, viz., about a mile p. 95, considered with the bearing of the *Alleghany*

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and the angle of intersection of their protracted courses, indicates that the *Pomaron* must have been nearly two-thirds of a mile from the protracted course of the *Alleghany,* which was the danger line.

There can be no doubt but that the *Alleghany* had ample time and sea room to avoid the *Pomaron* when the latter first ported her helm. Indeed, the chief officer admitted this on re-direct examination. In reply to the question:

"What did you think about the possibility of collision when you blew one blast?", he stated:

"My thoughts at the time were that if he had blown one blast and altered his course to starboard, if he had ported his helm, he could have gone under my stern." Pp. 107-108.

Also, on cross examination, in answer to the question:

"Q. In order to get the matter quite plain on the record will you tell us when it was that in your judgment the circumstances had developed so that collision became unavoidable unless you did something? A. Really not until the *Alleghany* had given me two blasts on the whistle.

"Q. Up to that time you had appreciated risk of collision from the time you blew your first whistle? A. Yes. [When a mile away, pp. 95, 139.]

"Q. But you thought it might have been avoided by the other vessel until she gave you two blasts? A. Yes.

"Q. Then she was half a mile away from you? A. Yes.

"Q. Bearing about three points as I understand you on your port bow? A. Yes.

"Q. Then it became under the rule your duty to do something? A. Yes.

"Q. It had not been your duty to do anything before that? A. No, sir." P. 109.

On redirect, the witness said further:

"Q. Of course you recognized, you know that under the International Rules, having the *Alleghany* on your port hand, it was your duty to maintain your course and speed? A. Yes.

Q. You did maintain your speed, did you? A. Yes, right up to the time I received the two.

Q. Until you thought collision was inevitable? A. Yes.

Q. But you changed your course? A. Yes.

Q. Why? A. Just to give the *Alleghany* a little more clearance." P. 108.

In other words, the officer in charge of the *Pomaron* gratuitously took it upon himself to perform the part of the manœuvre that pertained to the *Alleghany* solely, and thereby did what was said in *The Delaware,* 161 U. S., 459, at p. 469, "would bring about more collisions than it would prevent." There was certainly no immediate danger at that time, and moreover, the *Alleghany* had given no distinct notice that she would not comply with her obligations. The change of course made by the *Pomaron* was clearly premature.

It does not follow, however, that the situation was not then one to which the Rules had already become applicable, as is now contended by counsel for the petitioner. The officer responsible for the *Alleghany's* navigation appreciated that there was "risk of collision," although there was not "immediate danger," when he sounded the one-blast signal and ported, as appears from the testimony quoted above. P. 109. He also recognized the fact that it was not his duty under the rule to stop at that time, thus conceding that the rule was then in force and that he was navigating in respect of the rule as to this requirement at least. P. 101.

A number of authorities are cited in the petitioner's brief purporting to support the contention that the rules had not become applicable to the *Pomaron*, and that, by altering her course, she did not violate a statutory rule, therefore. It will be seen from an examination of these cases that the special circumstances of each case rendered it unnecessary to apply the rules of navigation sooner.

In *The Banshee*, 57 L. T. 841, 6 Asp. M. C. N. S. 221, which is extensively quoted in the petitioner's brief, that vessel was nearly a half-mile astern of the *Kildare* and gradually overtaking the latter when the rules were applied. It is manifest that the overtaking situation cannot be likened to a crossing case; in the former, the vessels necessarily have more time and space within which to manœuvre with respect to each other before risk is involved, while in the latter, as here, the vessels are approaching the danger lines of each other's courses rapidly.

Lord Esher remarked in *The Banshee*, p. 222:

"They [the rules] only apply at a time when, *if either of them does anything contrary to the Regulations*, it will cause danger of collision."

In other words, the rules must be applicable at that time, else the action taken could not be said to be a contrary one.

Under this *dictum*, the *Pomaron* clearly placed herself within the rule the moment the helm was ported, even if the rule did not apply earlier.

The Peter Benoit, 13 Asp. M. C. N. S. 203, the only case cited by the petitioner where the starboard-hand rule was applied, was a situation in which one vessel was entering a river and the other was passing out, when a change of course of one brought about a crossing situation. The

rule was held to be applicable at that moment. The *Pomaron,* on the other hand, had been on a crossing course long before she changed course, when about a mile distant from the *Alleghany,* and much less distant from the latter's course.

The ruling in *The Nichols,* 7 Wall., 656, from which the petitioner quotes, is contrary to its contention.

Mr. Justice Clifford in handing down the opinion of this Court, there held that the rules of navigation applied to two vessels when they were as much as two or three miles distant from each other. In that case the court was deciding the question of liability for a collision between a bark and a schooner. The vessels had sighted each other when two or three miles apart and at that time they were approaching each other nearly end on and if they had not changed their courses they would have soon been meeting nearly end on thus involving the risk of collision.

Immediately after the vessels sighted each other the mate of the schooner altered her course. This altering of course together with subsequent manœuvres on the part of the bark resulted in a collision.

The District Court in deciding the case held that the distance between the vessels of two or three miles was such that the schooner was not in fault in altering her course.

On appeal the Circuit Court was of a different opinion and held that as the vessels were nearly dead ahead when sighted and their combined speed 12 miles an hour they thus became within 10 or 15 minutes of meeting. They were dangerously close together so that the change of course on the part of the schooner involved not only the risk of collision but was the controlling cause of it.

Mr. Justice Clifford at page 665 said.

"Argument for the appellant is that the distance between two vessels was so great when the helm of the schooner was put to starboard that it cannot be considered as a fault and such it seems was the opinion of the District Judge; but the proposition in view of the circumstances cannot be sustained as it was in the night time and the combined speed of the two vessels was at least 12 miles an hour, and none of the witnesses pretend that more than 10 or 15 minutes elapsed after the second order of the master of the schooner was given to put the helm hard up, before the collision took place."

In the case of *The Scotia,* 14 Wall, 170, the steamship *Scotia* and the sailing vessel *Berkshire* had been in a collision as the result of which the sailing vessel was sunk. The statement of facts in that case, at page 174, contains the following reference to the distance between the vessels from the time that they were first sighted up to the time of the collision.

"The *Scotia* was first seen from the *Berkshire* bearing one point or so off the ship's port bow at a distance apparently of five or six miles, then the steamer's white mast head light only was seen.

"Immediately on her sighting the steamer which was at most from 15 to 20 minutes before the collision, her mate gave an order to luff and she did luff so as to head more into the wind. The effect of this was to make her go further to the south and thus diverge further away from the course of the steamer. She continued in this new direction 10 or 15 minutes, when, moving at the rate at which it was proved that the vessels were moving, she must have been more than 1 or 2 miles from the *Scotia.* Her helm was then suddenly put to starboard, then steadied for a brief period, then put hard astarboard and kept there, thus pointing her directly across the bow of the approaching vessel."

In delivering the opnion of this court, Mr. Justice Strong said at page 180;

"It is plain that had the ship continued on her course after she first saw the steamer's bright light, there could have been no collision and still more, had she not afterwards and when near the steamer put her helm to starboard, she would have been out of all danger."

The reference in Mr. Justice Strong's opinion to the wrongful manœuvre of the schooner in putting her helm to starboard refers to the time when, according to the statement of facts, the vessels were from 1 to 2 miles apart. The court held the schooner solely at fault. In the present case, the vessels were estimated to be a mile apart when the *Pomaron* ported.

In the case of *New York & Liverpool Steamship Company* v. *Rumball,* 21 How., 372, in which a steamer was condemned for not taking timely precautions to avoid collision with a sailing vessel whose lights had been in sight about fifteen minutes. Mr. Justice Clifford in handing down the opinion of this Court, said, at page 384:

"The rules of navigation such as had been mentioned are obligatory upon vessels approaching each other from the time the necessity for precaution begins and continue to be applicable as the vessels advance so long as the means and opportunity to avoid the danger remain. * * *"

This statement of the rule was cited with approval by Mr. Justice Brown in the case of *The Breakwater,* 155 U. S., 252, at page 264.

There was a question as to whether or not the navigation rules should apply to a ferryboat at the moment she started to leave her berth in the slip, and this Court held that the rules became operative as her bow reached the outer side of the pier.

After quoting from Mr. Justice Clifford's opinion, Mr. Justice Brown said:

"Where rules of this description are adopted for the guidance of seamen who are unlearned in the law and unaccustomed to nice distinctions, exceptions should be admitted with great caution and only when imperatively required by the special circumstances mentioned in Rule 24, which may exist in any particular case, rendering the departure from them necessary in order to avoid immediate danger."

The question as to when the rules take effect is clearly answered by the court in the case of *The Transfer No. 10,* 137 Fed., 666.

Judge Holt, in deciding that case, said at page 666:

"And the question in this case as in all collision cases is not what the colliding vessels do when they get down close to each other, but what was the manœuvre which was adopted and what was the manœuvre which it was their duty to adopt under the rules of the law *when they were still far enough apart to adopt those manœuvres deliberately and safely.*" (Italics ours.)

In the case of *The Philadelphia,* 199 Fed., 299, a tug and tow had collided with a schooner. The master of the tug had seen the schooner beating down the river three miles away. The tug continued to proceed up the river without any change of course or speed. The schooner continued on her course until on her last tack before the collision and then when about 150 feet from the tug her wheel was put hard-a-starboard in an attempt to avoid the collision.

The Court said at page 302:

"[1] The expression 'risk of collision' has a different meaning from the expresion 'immediate danger' as used in the twenty-seventh article.

'Risk of collision' means 'chance', 'peril', 'hazard', or 'danger of collision' merely, and not immediate danger. *The D. S. Gregory* and *The George Washington,* Fed. Cas. No. 4, 1000. 'Risk of collision, means, not merely certainty of collision, if no efforts be made to avert it, but danger of collision; and there is danger or risk of collision whenever it is not clearly safe to go on. *The Aurania* and the *Republic* (D. C.) 29 Fed. 98, 123.

In the case of *The Seaton,* 9 P. D., it was found that the vessel *Polcevera* and the *Seaton* prior to the collision had been running on parallel courses, the *Polcevera* being the hindmost and faster vessel. Subsequently when the *Polcevera* was 3 or 4 miles distant from the *Seaton,* the course of the former was altered so as to intercept the course of the *Seaton* and as a result of this change of course the collision occurred. The court held that the *Polcevera* was at fault for this alteration of her course and the resulting collision.

In the case of the *Jesmond* and the *Earl of Elgin,* L. R. 4 P. C. 1, the court held that two steamers were within such proximity "as to involve risk of collision" where they were meeting on nearly opposite courses at a joint speed of 18 or 19 knots and distant a mile and a half from each other.

The same ruling was made in the case of *The Bougainville* and *James C. Stevenson,* L. R. 5 P. C. 316, where a steamship and a sailing vessel were distant two or three miles from each other and approaching at a joint speed of 17 knots.

In the present case, although the vessels were estimated to be about a mile apart when the *Pomaron* departed from the rule by changing her course, the distance to the point of danger, viz: the intersection of the respective courses protracted, was considerably less, and the vessels were approaching this point at a combined speed

of more than 20 knots. The change of course by the *Pomaron* at this time altered the relative bearings of the two vessels, and necessarily operated to change the result. It was a vital movement, therefore. The result shows that it was one that did not lessen the risk of collision, and, on the contrary, that it increased the danger. It was a manœuvre directed particularly with respect to the *Alleghany,* and on the assumption that the rules were then applicable to the latter vessel. It was plainly an act within the meaning and operation of the rules, and its effect should be considered accordingly.

It is suggested by the petitioner that the *Pomaron's* departure from the rules should be disregarded on the ground that it did not prejudice the *Alleghany's* navigation, since the latter's navigators were not aware of the *Pomaron's* presence at this time. It may be purely speculative to predict what the *Alleghany* might have done if the *Pomaron* had not changed course, but the established facts clearly indicate that the *Alleghany's* omission to do anything would *not* have resulted in collision. If the *Pomaron's* movement did not in fact decrease the danger, it cannot be said that the *Alleghany* was not prejudiced, despite the latter's ignorance of the change of course. A wrongful manœuvre is certainly not justifiable simply because it is not known to others affected by it. The proposition of the petitioner seems equivalent to freely licensing infractions of law, so long as the party who may be injured thereby is kept in ignorance of the unlawful act.

The courts have shown repeatedly their aversion to admitting exceptions to the rule that the starboard hand vessel in a crossing situation must hold her course and speed. *The Corsica,* 9 Wall., 630; *The Elizabeth Jones,* 112 U. S., 514; *The*

Britannia, 153 U. S., 130; *The Breakwater,* 155 U. S., 252; *The Delaware,* 161 U. S., 459; *The Chicago-The City of Augusta,* 125 Fed., 712, *reversing* 102 Fed., 991; *The Eagle Wing,* 135 Fed., 826; *The John Fleming,* 136 Fed., 917; *The Cygnus, The H. F. Dimock,* 142 Fed., 85; *Lake Erie Transportation Company* v. *Gilchrist Transportation Company,* 142 Fed., 89; *The Umbria,* 153 Fed., 851; *The John H. Starin,* 162 Fed., 146; *The Deveaux Powell,* 165 Fed., 634; *reversing* 120 Fed., 522; *United States* v. *Erie Railroad Company,* 172 Fed., 51; *The James A. Walsh,* 194 Fed., 549; *The Haida-The Natalie,* 191 Fed., 623; 196 Fed., 1005; *The Elizabeth,* 197 Fed., 160; *The Putney Bridge,* 219 Fed., 1014.

The case of *The Britannia,* 153 U. S., 130, was decided under the earlier rule, which required the starboard hand vessel to maintain her *course* only. 153 U. S., p. 138. The additional requirement as to maintaining the *speed* was added to the later rule. 153 U. S., p. 442. Nevertheless, the Court held the starboard hand vessel, *Beaconsfield,* at fault for stopping and becoming motionless, thereby failing to fulfill her obligation to keep her course.

The Court, by Mr. Justice Shiras, stated at pages 141-142:

"It is argued that the words 'shall keep her course' do not mean that she shall maintain her speed, and English cases are cited to the effect that the rule does not imply that the vessel shall *maintain the same speed.* If this is all that is meant in the cases cited, and we so read them, we have no reason to disagree with them, and they do not, in the slightest degree, impugn our reasoning. But if the contention is, and if those cases must be understood as holding that a vessel, whose duty it is to keep her course, complies with that duty by reversing her engines and ceasing

to move at all, we are unable to concur in such a view. It is inconsistent with both the words and the sense of the rule. A vessel which voluntarily becomes motionless cannot properly be said to keep her course. The word 'course,' both from its etymology and the primary meaning given to it by lexicographers, signifies a running or moving forward—a continuous progression or advance.

"The collocation of the rule, and its direct reference to rules 17, 19, 20 and 22 [governing the crossing situation], plainly point to the meaning that, while the other vessel must keep out of the way, the preferred vessel shall not interfere with or thwart the movements of such other vessel by bringing a new element into the calculation, which would be done if, instead of pursuing her course, she stopped her headway. It is not meant that some exigency or obvious danger might not justify her in checking her speed, and even in stopping altogether. But such a case is provided for in the twenty-fourth rule. As we have seen, no such exigency is found to have existed in the present case."

In *The Delaware*, 161 U. S., 461, this Court declined to hold the *Talisman*, the starboard hand vessel, at fault, although she continued to hold her course and speed up to the moment of collision. P. 466.

Mr. Justice Brown, in delivering the opinion of this Court, stated:

"When the *Delaware* was about a length off, the *Talisman* sounded an alarm signal of three blasts, *but did not change her helm or reduce her speed before the collision*" [italics ours]. P. 466.

* * *

"The main fault charged upon the *Talisman*, however, is that of not stopping and reversing, when the failure of the *Delaware* to take measures to avoid her became apparent." P. 467.

* * *

"The duty of a steamer having the right of way, when approaching another steamer charged with the obligation of avoiding her, has been the subject of much discussion both in the English and American courts. That her primary duty is to keep her course is beyond all controversy. It is expressly required by the 19th Rule of the original International Code, (Rev. Stat. § 4233), and of the 16th Rule of the Revised Code of 1885, and doubtless applies so long as there is nothing to indicate that the approaching steamer will not discharge her own obligation to keep out of the way." P. 468.

* * *

"The cases of *The Britannia,* 153 U. S., 130, and *The Northfield,* 154 U. S., 629, must be regarded, however, as settling the law that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty. If the master of the preferred steamer were at liberty to speculate upon the possibility, or even of the probability, of the approaching steamer failing to do her duty and keep out of his way, the certainty that the former will hold his course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place to doubts on the part of the master of the obligated steamer as to whether he would do so or not, and produce a timidity and feebleness of action on the part of both, which would bring about more collisions than it would prevent. *Belden* v. *Chase,* 150 U. S., 674; *The Highgate,* 62 L. T. R., 841; S. C. 6 Asp. Mar. Law Cases, 512." P. 469.

In *The Elizabeth,* 197 Fed., 160, the Circuit Court of Appeals for the Second Circuit condemned the starboard hand vessel for altering her course where the situation was considered by

her navigators as one of emergency, overruling the District Court, which had excused the change of course as justifiable under the circumstances. The Circuit Court of Appeals stated at p. 162:

"We have little doubt that, had the *Elizabeth* when she sighted the *Scotia* navigated as the priviliged vessel to cross the bow of the *Scotia*, this collision would not have happened; the question is, was she in fault for not doing so? The starboard hand rule operates on both vessels, the one is to get out of the way by change of course or stopping or reversing. The other is to keep her course and speed."

It follows from the authorities cited that the obligation of the *Pomaron* to maintain her course and speed was as binding under the rules as that of the *Alleghany* to keep clear. The *Pomaron* did not have the right to change her course until the *Alleghany* could not by any possibility fulfill her duty to keep clear. Her premature change of course was a distinct violation of the statute.

If such infractions of the rules are to be condoned, the rules become ineffectual, and the certainty of conduct, which results from strict observance of the rule, would give place to wavering and hesitation on the part of those for whose guidance the statutes were enacted.

Mr. Chief Justice Fuller, in delivering the opinion of this Court in *Belden* v. *Chase*, 150 U. S., 674, pp. 698-699, forcefully expressed the necessity of requiring strict adherence to the rules of navigation as follows:

"Obviously they must be rigorously enforced in order to attain the object for which they were framed, which could not be secured if the masters of vessels were permitted to indulge their discretion in respect of obeying or departing from them."

* * *

"Obedience to the rules is not a fault even if a different course would have prevented the collision, and the necessity must be clear and the emergency sudden and alarming before the act of disobedience can be excused. Masters are bound to obey the rules and entitled to rely on the assumption that they will be obeyed, and should not be encouraged to treat the exceptions as subjects of solicitude rather than the rules. *The Oregon,* 18 How., 570."

It is contended on behalf of the petitioner that the *Pomaron* should not be condemned for her failure to comply with the rule, because the *Alleghany* was grossly at fault in respect of her lookout, in accordance with the rule stated by Mr. Justice Brown in *The Umbria,* 166 U. S., 404, p. 409, and applied in *The Victory and The Plymothian,* 168 U. S., 410, p. 423. It is to be remarked, however, that in these cases the vessel which invoked the rule did not commit any specific statutory fault.

The case of *The Oregon,* 158 U. S., 186, cited in support of the major and minor fault doctrine, did not involve a violation of a statutory obligation on the part of the vessel exonerated. The *Clan Mackenzie* in that case was charged with fault for failure to show a torch to the *Oregon,* the former being at anchor. The Court found that the *Clan Mackenzie* was displaying proper anchor lights in accordance with the statutory requirements, p. 198, and that the statute requiring the display of a torch light was not applicable to foreign vessels, the *Clan Mackenzie* being British. Pp. 189 and 199.

Similarly the case of *The Lord O'Neill,* 66 Fed., 77, involved an omission on the part of the tug *Peerless,* to sound a passing signal required by the regulations of the supervising inspectors of

the Steamboat Inspection Service. P. 78. The statutory rules of navigation were not considered in connection with the *Peerless*. The Court found that the failure to sound the signal "could not have prevented the change of course or checked the speed of the steamship, which was the primary and immediate cause of the collision and therefore did not contribute to it." P. 80.

The major and minor fault doctrine apparently is without force where a violation of a statutory fault in any degree occasions or materially relates to the collision. It should not be applied simply because the fault of one vessel is the primal or more pronounced cause of collision. *The Albert Dumois,* 177 U. S., 240. *The Manitoba,* 122 U. S., 97, p. 109. *The Sunnyside,* 91 U. S., 208.

In the present case, both vessels committed statutory faults, the *Alleghany* in failing to keep out of the way as required by Article 19, and the *Pomaron* in failing to keep her course as required by Article 21. If the case were between the two ships, the rule of the *Umbria* might as well have been invoked by the *Alleghany* as by the *Pomaron*. Each vessel violated a statutory obligation, and each is answerable to innocent third parties for the damage that resulted, unless it is in a position to show that its fault, arising from the violation of its statutory duty, was not a cause of collision. *The Pennsylvania,* 19 Wall., 125.

The *Pomaron's* navigation under the circumstances here, both by reason of her departure from the rule, and because of the presumption arising from the occurrence of a collision under the conditions that prevailed, should be subjected to the strictest scrutiny.

SECOND POINT.

THE FAULTS OF THE "POMARON" CONTRIBUTED TO THE COLLISION.

It is asserted in the brief of the petitioner that the *Pomaron's* first porting did not contribute to the collision, but there is not any attempt made to demonstrate the truth of the statement, or to state the facts on which the assertion is based. The discussion is concerned mainly with a more or less academic distinction between the so-called "could not" and "did not" rules of burden of proof.

The violation of a statutory rule binding on the *Pomaron* having been clearly established, it seems that the important inquiry is whether or not this fault contributed to the collision in fact.

Our contention is that the initial porting was an important factor of the resulting collision, and clearly contributory thereto; moreover, that this act was induced by the negligence of the officer in charge in failing to take proper compass bearings as required by the rules; and, furthermore, that the hard-porting, coupled with reversal of the engines, was also a contributing fault, and not excusable under the circumstances.

There is not any dispute concerning the *courses* and *speeds* of the two steamers as they aproached each other.

The angle at which the original courses intersected is established as 111°, and this angle remained the same up to the time that the *Pomaron* first ported.

The speeds were in the ratio of 11½ knots to 9 knots, the latter being that of the *Pomaron.*

The only other factor at all open to discussion is the bearing of the *Alleghany* from the *Pomaron* prior to and at the time of the latter's vital change of course. That there is any element of uncertainty on this point is due to the dereliction of the

officer charged with the duty of "carefully watching the compass bearing"; and, also to his obvious inclination to repudiate his contemporaneous record of the bearing of the *Alleghany*.

The bearing was entered in the log book shortly after the event as about North East. Pp. 90-93. There seems to have been only this one compass bearing taken, and it should be accepted as fixing the relative positions of the two vessels. A North East bearing would place the *Alleghany* three (3) points on the *Pomaron's* port bow.

The testimony of Westgarth, the officer in charge of the *Pomaron's* navigation, is as follows:

"Q. At 10.35 according to your memorandum you sighted a steamer on the port bow steering to southward?

A. Yes.

Q. Bearing about North East?

A. Yes.

Q. Did you take that bearing by the compass?

A. It was not a proper compass bearing; I just glanced over the top of the compass and took a rough bearing.

Q. It was not a guess; you looked at the compass?

A. It was not a true bearing, not an accurate bearing." P. 94.

Q. You looked over the compass at the vessel?

A. Yes.

Q. This was as near as you could come to it without taking a more careful bearing?

A. Yes.

Q. You were at that time steering by compass east by north?

A. Yes.

Q. The vessel was three points on your port bow approximately?

A. Yes; it would be more than that.

Q. It would be three points if that is correct?

A. Yes, if that is correct, if the bearing is correct.

Q. You intended it to be correct when you put it in the log?

A. It was partly what I remembered afterwards that I put in the log book because I don't take any note of the bearing at the time.

Q. You put it in a good deal nearer the time of the occurrence than today?

A. Yes.

Q. That was your best recollection at the time?

A. Yes.

Q. When did you put this down in the log book?

A. About 1 o'clock.

Q. The matter was all quite fresh in your mind at that time?

A. Yes." Pp. 93-94.

* * *

"Q. Did she continue to bear northeast from you?

A. Practically; she did not alter the bearing at all." P. 95.

That the bearing of the *Alleghany* from the *Pomaron* was not more than three points and probably less is established by other testimony.

The chief officer of the *Pomaron* testified that when the *Alleghany* answered the *Pomaron's* whistle with a signal of two whistles, the vessels being then half a mile apart, the *Alleghany* bore about four points, between three and four points, on the *Pomaron's* port bow.

"Q. At the time the vessel was half a mile away when she gave the two blasts what was her bearing from you?

A. How many points on the bow?

Q. Yes.

A. Probably about four points, three or four points on the bow." P. 103.

It is admitted that by her first porting the *Pomaron* had changed one point to starboard by the time the *Alleghany* answered with two whistles

and such porting must have increased the original bearing by one point; so that, if the bearing was four points *after* the change of course, it was three points *before* the change was made.

Another circumstance bearing upon the disputed question as to the *Alleghany's* bearing from the *Pomaron* is that the *Alleghany's* wheelsman failed to notice the approach of the *Pomaron* because his view to starboard was cut off by a wind-shield on the starboard side of the bridge. In order that this wind-shield should prevent his noticing the *Pomaron* it is necessary that she should have been well on the *Alleghany's* starboard bow, and the wider the bearing of the *Alleghany* from the *Pomaron*, the less the bearing of the *Pomaron* on the *Alleghany's* starboard bow must have been.

If the *Alleghany* bore as much as four points on the port bow of the *Pomaron*, the bearing of the *Pomaron* on the starboard bow of the *Alleghany* could not have been more than 24° or slightly more than 2 points, and the wheelsman should and would have seen the *Alleghany* notwithstanding the presence of the wind-shield on the starboard side of the bridge.

The angle at which the original courses of the vessels intersected is known to have been 111°.

If the *Alleghany* bore North East from the *Pomaron*, which is 3 points on the latter's port bow, the relative positions of the vessels with reference to the point of intersection of their courses may be represented by a triangle having angles of 111°, 33°45′ and 35°15′. By applying the rule that the sides of a triangle are proportionate to the sines of the opposite angles, it can readily be ascertained that the side of such triangle representing the distance of the *Pomaron* from the point of intersection of the courses would be 3760 feet, and the side representing the distance of the *Alleghany* from such point of in-

tersection would be 3618 feet, the side opposite the obtuse angle, 111°, being the distance of the *Alleghany* from the *Pomaron,* viz., one mile, or 6,080 feet.

The result may be reached practically by a graphic presentation as shown on the diagram appended.

It is evident that under these conditions no collision would have occurred had both vessels kept on without change of course or speed, for the *Alleghany* would have crossed the bow of the *Pomaron* with a good margin of safety. The *Alleghany* being 310 feet long and only 3618 feet from the point of intersection of the courses, and travelling at a speed of 11½ knots or 1165 feet per minute, her stern would have passed the point of intersection of the courses in 3.371 minutes. The *Pomaron,* 3760 feet from the point of intersection and proceeding at 9 knots, or 912 feet per minute, would travel in the same time 3076 feet; that is to say, the *Pomaron's* bow would have been 696 feet away from the point of intersection of the courses when the *Alleghany's* stern had passed it. *Diagram appended.*

The change of the *Pomaron's* course to starboard under a port helm would therefore carry her from a position of safety into one of danger, and must have contributed to the collision.

It is demonstrable also that had the *Pomaron* held her course, as Rule 21 provides, until the *Alleghany* had answered her signal, and had she *then* put her helm hard-aport and reversed her engines, as she did, collision would not have occurred.

If the bearing of the *Alleghany* on the *Pomaron's* bow was about four points when the *Alleghany* answered with two blasts, the vessels then being half a mile apart, the *Pomaron* must

have been 1,780 feet distant from the line of the course of the *Alleghany.** When at that distance it is admitted that she had completed a change of at least one point from her original course, and that difference of one point in her heading necessarily resulted in a difference of one-fifth of the distance she had to run, in the point at which she would cross the course of the *Alleghany;* that is, in travelling 1,780 feet she crossed the original course of the *Alleghany* more than 350 feet to the southward of the point at which she would have crossed had her course not been changed one point to starboard.

The fact that by the combined effect of her subsequent hard-aporting and reversed engines she swung further to starboard in no degree counteracted or offset the effect of her initial porting. It carried her still further to starboard, but the point at which collision occurred was necessarily 350 feet to the southward of the point at which she would have crossed the *Pomaron's* course, had her change of one point by her initial porting not been made. Since she

* NOTE: This result may be obtained by applying the proposition that the sides of a triangle are proportional to the sines of the opposite angles.

That the *Pomaron* must have been as much as 1780 feet from the course of the *Alleghany* when the latter's signal of two whistles was blown is shown by other testimony.

The Chief Engineer of the *Pomaron* testified, and the entries in his log corroborate his recollection, that about four minutes elapsed between the order full speed astern and collision, and that it took half a minute to reverse his engines. He also testified that the *Pomaron* would come to a standstill four minutes after her engines were reversed.

When the time within which a vessel may be brought to rest is known, the distance she will run can be determined by the formula: D=7/10 S T, in which D represents the distance in feet, S the speed in knots, and T the time in seconds. *Knight's Modern Seamanship*, p. 216.

The *Pomaron* requiring 4 minutes, or 240 seconds, to stop, and her full speed being 9 knots, the distance she would run before stopping would be 1,520 feet, according to this formula.

During the half minute occupied in reversing her engines, she would run at full speed 456 feet, making the total distance she would run, after the order to reverse was given, 1,968 feet. The *Pomaron* had, however, some headway at the time of collision.

struck the *Alleghany* only 100 feet from the latter's stern, it is apparent that had she been 350 feet further to the northward collision would not have occurred.

Her initial porting of one point did therefore contribute to the collision as a proximate cause thereof. See foot note, p. 42.

The chief officer of the *Pomaron* attempted to correct the bearing to which he had committed himself at the time of the occurrence, as that bearing obviously established not only that the situation did not require any action on his part, but that the porting brought the *Pomaron* directly into collision.

His further testimony on the bearing, which follows, also shows a remarkable lack of appreciation of the importance of the premonitory article in the International Rules:

"Preliminary—Risk of Collision."

"Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist."

He testified:

"Q. Did you watch the bearing of the other vessel?

A. Yes, just roughly.

Q. During this three-quarters of an hour?

A. Yes." P. 95.

* * *

"Q. You saw her first about three points on your port bow bearing about northeast?

A. Yes, perhaps she was more than that; if I had taken a correct bearing——

Q. It might have been less if you had taken a correct bearing?

A. Yes." P. 104.

* * *

"Q. You think the North East bearing mentioned in the log is not correct?

A. No, it can't be correct.

Q. How many points do you think you should have her on your port hand?

A. It should have been 5 at least, I should say." P. 113.

* * *

"Q. What is your recollection as to what her bearing was when you first saw her?

A. She would be five points, four or five points on the bow.

Q. When she was 10 or 12 miles away?

A. Yes." P. 113.

"Q. I asked whether you did not make the entry in the log book of the bearing as you actually thought it was at the time and you told me you did after looking over the compass?

A. I did not take a bearing; I did not notice the bearing; I just walked to the compass and looked over the top of the compass, because the compass is amidships, and by taking, as I very often do, a rough bearing of anything by the stanchion, you can tell whether she is within a point or a couple of points or where she is." P. 113.

* * *

"Q. Looking over the top of the compass you judged the vessel bore from you North East?

A. Not at the time I didn't.

Q. You put it in the log that way?

A. Yes, I put it in the log that way afterwards.

Q. You put it in the log at one o'clock?

A. Yes.

Q. Wasn't that your best judgment at the time of the bearing of the ship when you saw her?

A. I don't think it was.

Q. Do you mean to say that you would have put something in the log which at the time was not

your judgment as to the truth of the item you were putting in?

A. As far as I could judge as to the point, but I never worked it out to see how many points she was.

Q. The only reason you doubt it is now you see if she had been bearing the way you put it in the log and both vessels had steered in the direction you say that they were steering, and with the speed which you thought each of them had, there would not have been any collision unless you had ported? Isn't that so?

A. It was inevitable that there would be a collision the way she was coming; I couldn't go by the bearing at all; if I had taken a proper compass bearing, but I didn't." P. 114.

Why the chief officer of the *Pomaron* found it necessary to discredit the entry in his log of the bearing of the *Alleghany* is apparent, but it is evident that the bearing of the *Alleghany* from the *Pomaron* when first sighted could not have been *five* points *or even four points* as her chief officer stated.

If when ten miles distant she had borne even 4 points on the *Pomaron's* bow, the *Alleghany* would have been 7.57 miles and the *Pomaron* 4.36 miles from the point of intersection of the courses, and in that case the *Pomaron* would have reached the point of intersection of the courses when the *Alleghany* was more than 2¾ miles distant therefrom as will be found by applying the trigonometrical proposition or the graphic presentation referred to previously.

The faults of the *Pomaron* do not require mathematical demonstration, however. Her mate violated the rules without assuring himself of the necessity of doing so, and before there was

any such danger as to require action on his part. *Ante,* pp. 15-16.

It seems inconceivable that an officer in charge of a steamer, under the conditions that confronted the *Pomaron* should content himself with one hasty sight over the compass to ascertain whether or not the bearing of the *Alleghany* was changing. His testimony concerning the northeast bearing has been quoted above. He admits that he watched the bearing of the other vessel "just roughly," p. 94, that he "didn't bother to take any bearings at all"; p. 103, and that the *Alleghany's* bearing might have been more, or it might have been less than three points, if he "had taken a correct bearing." P. 104.

The question arises why he did not take several correct bearings during the *forty six minutes* interval from first sighting the *Alleghany,* at 10.35 A. M., to the collision at 11.21 A. M., or during the *thirty-nine minutes* from first sighting her to the change of course at 11.14 A. M. There can be no answer except an admission of a fault on the part of the officer on watch, and one that it is reasonable to infer was a contributing cause of the collision. It was incumbent on him to be sure that his change of course was justifiable. The importance of an accurate observation is emphasized by the "Preliminary" article of the International Rules. *Ante,* p. 37. If the change of course was made under an erroneous assumption as to the bearing of the *Alleghany,* which is the most favorable inference to be placed on the responsible officer's testimony, this does not excuse the fault. *The Glenogle,* 122 Fed., 503; *The Diana,* 181 Fed., 263.

The means adopted by the *Pomaron's* navigators to avoid collision, after it was definitely known by the *Alleghany's* two-blast signal that the latter would continue across the *Pomaron's*

bow, were ones the least likely to avoid the collision; but the situation could have been saved even then, if the *Pomaron* had not placed herself in a position of danger by her initial porting; that is, if she had not already headed a point towards the direction of the *Alleghany's* course, the effect of which had to be overcome.

In an elaborate discussion of manœuvres to avoid collision, with accompanying plates, in *Knight's Modern Seamanship,* Chapter XV, plates 98 and 99, pp. 250-259, the author demonstrates that the safer manœuvre under the circumstances that pertained then to this situation would have been to starboard the *Pomaron's* helm; also that if the port helm was used, the engines should have been kept at full speed ahead, to clear the danger arc as quickly as possible.

The District Judge, in commenting on the second port helm movement, stated:

"It seems to me reasonably clear that, had Westgarth starboarded, he would have cleared the *Alleghany.*" P. 155.

The manœuvre the *Pomaron* adopted of reversing when she hard-aported was, as is stated in Knight on Modern Seamanship, page 296, "the surest possible way of bringing about collision."

Starboarding at that moment would undoubtedly have prevented collision, or upon hard-aporting she should have kept her speed. She had 1700 feet to run before reaching the *Alleghany's* course, and by keeping her speed and hard-aporting she could have changed her course *eight points,* or 90° in advancing four lengths (1112 feet) along a line parallel with her original course. Knight's Modern Seamanship, p. 213.

It is claimed in petitioner's brief that the action at this moment was *in extremis.* It can hardly be said that a situation *in extremis*

exists when vessels are *half a mile apart* in broad daylight.

Another feature of the second helm movement, viz., the hard-aporting, is that it was probably a continuation of the first porting and induced by the latter, since it would have been more difficult to turn the *Pomaron's* head to port if the helm was already partly to port. The first fault directly affected the second movement, therefore; and the repeated error is fairly attributable to the initial violation of the rule.

If the *Pomaron* had kept her course until her Navigating Officer believed or realized that action on *his* part was necessary to avoid collision, which is the test laid down in all of the decided cases so far as the privileged vessel is concerned, collision would have been avoided had he then starboarded, or had he hard-aported and kept his speed, or had he reversed the engine only, *or had he done exactly what he actually did do* when any necessity of action on his part had arisen.

It is submitted that the proofs affirmatively establish that the *Pomaron's* faults did contribute to the collision.

NOTE: The natural sine of an angle of one point, viz., 11° 15′ of arc, is known to be .19509, *Bowditch Tables*, p. 383, the sine being the ratio of the perpendicular opposite the angle, to the hypothenuse, of the plane right triangle.

The perpendicular in linear measure varies with the distance from the angle measured, always at the ratio of the sine, which is to say that the perpendicular distance, or approximately the chord substending the angle, is about one-fifth the hypothenuse. Applying this fact to the practical problem of the effect of one-point change of course, it follows that the alteration in the vessel's position to one side, or the traverse, is equal to one-fifth of the distance made ahead, or the advance; that is, in a distance of one mile, the change of course of one point would bring the vessel to a position about a fifth of a mile above or below where the line of the original course would have placed her.

In the instance of the *Pomaron*, assuming she ran 2,700 feet ahead under her one-point change of course, to the southward, she would theoretically bring up at a point 540 feet south of where she would have arrived if the change had not been made, and, in a distance travelled of 3,760 feet, she would arrive at a point 752 feet further to the southward than if the course had not been altered.

THIRD POINT.

THE LOWER COURTS PROPERLY DECIDED THAT THE POMARON HAD NOT SUSTAINED THE BURDEN OF PROOF TO SHOW THAT HER FAULT DID NOT CONTRIBUTE TO THE COLLISION.

The gist of the petitioner's contention is that it has been charged with the burden of proving that the premature porting by the *Pomaron* could not possibly have contributed to the collision, and that all that should have been required was proof that such fault actually did not contribute thereto.

While in the opinions of both the District Court and the Circuit Court of Appeals it is stated that they were unable to find on the proofs that the initial porting by the *Pomaron* could not possibly have contributed to the collision, by neither court was the "could not" as distinguished from the "did not" rule actually applied. The distinction between the two rules appears to be that the "could not" rule obviates "the necessity for the determination of this question of fact (often a very nice one) upon conflicting evidence." *The Fanny M. Carvill,* (1888) 13 A. C. 455, 459; while under the "did not" rule the presumption that the violation of a statute did contribute to a disaster may be rebutted by evidence establishing that it actually did not contribute thereto. It is a peculiarity of the present case, that whatever conflict there is in the evidence appears in that of the *Pomaron's* own witnesses and especially in the testimony of the officer in charge of her navigation.

The District Judge not only gave this testimony most careful consideration but made elaborate calculations in the hope, as he frankly admits, of finding some adequate ground for ex-

onerating the *Pomaron,* and he states as his final conclusion "that absolutely no certainty whatever is possible." P. 155.

His opinion leaves no doubt that his final conclusion was that the evidence failed to establish that the initial porting by the *Pomaron did not* contribute to the collision.

The petitioner also argues that the Circuit Court of Appeals has decided that the fact that it was impossible upon the evidence to determine that collision would have occurred had neither vessel changed her course or speed made it impossible to determine whether the *Pomaron's* initial porting did or did not contribute to the collision, and this, it is said, is not a proper test.

The Circuit Court of Appeals, however, clearly indicated its attitude in respect of the proofs required, as appears from the following statement in its opinion:

"Concluding then, as we have, that the *Pomaron* was in fault, it remains to inquire *whether the fault contributed to the collision.* For if the fault had nothing to do with the collision it may be disregarded. The law unquestionably is that in cases of collision liability for damages rests upon the ship or ships whose fault occasioned the injury. And in considering whether the fault of the *Pomaron* contributed to the collision it is necessary to keep in mind the rule laid down by the Supreme Court in *The Pennsylvania,* 19 Wallace 125, 136 (1893) where the Court said:

" 'But when, as in this case, a ship at the time of the collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it

probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute.' " Pp. 171-172.

The Court then proceeded to analyze the testimony in detail, and finally concluded that the evidence was not such as to justify the Court in exonerating the *Pomaron*, stating at page 173, "We have examined the evidence in the case with care and we have not been satisfied that either one of these vessels was free from fault." P. 173.

Both Courts, therefore, decided on the evidence adduced that the proofs were not sufficient to show that the *Pomaron's* faults *did not* contribute to the collision.

The rule of law applicable to the *Pomaron* as laid down in *The Pennsylvania*, 19 Wall., 125, is well settled. *Richelieu Navigation Company* v. *Boston Insurance Company*, 136 U. S., 408, pp. 422, 423; *Belden* v. *Chase*, 150 U. S., 674, 699; *The Martello* v. *Willey*, 153 U. S., 64, 76; *The Kate Butteroni*, 59 Fed., 494; *The Edward Smith*, 135 Fed., 32, p. 35; *Mooney* v. *Carter*, 152 Fed., 147; *Eastern Dredging Company*, 159 Fed., 540; *The Admiral Schley*, 142 Fed., 64, p. 67 (application for certiorari refused, 201 U. S., 648); *Hawgood Transit Co.* v. *Mesaba S. S. Co.*, 166 Fed., 697; *The Ellis*, 152 Fed., 980; Spencer on Collisions, p. 333, and authorities cited, viz.: *The Genesee Chief*, 12 How., 443; *Gaslee* v. *Shute*, 18 How., 463; *The Emily* Olc., 132; 1 Blatch., 236; *Cohen* v. *The Mary T. Wilder*, Taney, 567.

It is the petitioner's contention, apparently, that the lower Courts here erred in interpreting the meaning of the rule as applied in *The Pennsylvania*, 19 Wall, 125.

In that case the collision had occurred in a dense fog, between a sailing bark and a large

steamer, about 201 miles from Sandy Hook, in the track of inward- and outward-bound vessels. The bark was under way, and was moving at about the rate of one mile an hour. She was ringing a bell as a fog signal. The steamer was moving at the rate of seven knots an hour. The court divided the damages, holding the steamer at fault for immoderate speed in a dense fog, and the bark in contributory fault for her violation of the Act of Congress which requires sailing vessels under way to use a fog horn.

At page 135, Mr. Justice Strong, in delivering the opinion of this Court, said:

"It is next to be considered whether any fault of the bark *contributed* to the collision. That she was in fault is beyond controversy. She was in plain violation of the rules of navigation which required her to blow a fog horn * * * It must be conceded that *if it clearly appears the fault could have had nothing to do with the disaster, it may be dismissed from consideration.* The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute." * * *

"*Then how can it be shown on the part of the bark that the failure to use the fog horn certainly contributed in no degree to the collision?* * * * The truth is the case is one in which, while the presumption is that the failure to blow a fog horn was a contributory cause of the collision, and

while the burden of showing that it was in no degree occasioned by that failure rests upon the bark, it is impossible to rebut the presumption. * * * Hence it appears to us the bark has not proved that her failure to obey the shipping regulations was not a concurrent cause of the injury she received."

The application of the rule in that case was more rigorous, if anything, than in the present case. This Court plainly stated in *The Pennsylvania,* "it is impossible to rebut the presumption" that the failure to comply with the statute did not to some extent occasion the collision. The harshest light in which the conclusions of the lower courts in this case may be regarded is that they decided the proofs were left in a situation of uncertainty; they did not go so far as to find that the presumption was one impossible to rebut in any event.

The later decisions of this Court reaffirmed the rule of law as stated in *The Pennsylvania.*

In the case of *Richelieu Navigation Co.* v. *Boston Insurance Co.,* 136 U. S. 408, the *Spartan* had stranded while running at full speed in a dense fog in violation of the statute requiring all vessels to go at a moderate speed in a fog. It appeared that the compass of the ship was defective. The action was brought on a policy of insurance and was tried at common law. The thirteenth charge to the jury was as follows:

"13. The law of Canada provides that all vessels shall run in a fog at a moderate rate of speed; and I do not undertake to direct you one way or the other in regard to this fact—that is, the rate of speed—but merely to say in general terms that if you find that the loss was occasioned by the excessive speed of the vessel, or by her want of

a lookout, or by the defects of the compass, the defendant is not liable." P. 414.

Mr. Chief Justice Fuller, in handing down the opinion of this Court, in which he approved the above charge, said, at page 422:

"In *The Pennsylvania,* 19 Wall., 125, it was held that where a vessel has committed a positive breach of statute, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so. *And this was but the statement of the settled rule in collision cases.* In this case, in view of the seventh section of the Canadian statute, and the fact that perils occasioned by the want of ordinary care and skill or of seaworthiness were excepted by the policy, the same rule is applicable; hence, the burden was on the plaintiff to show that neither the speed of the steamer nor the defect of the compass could have caused, or contributed to cause, the stranding."

Belden v. *Chase,* 150 U. S., 674, was an action at law brought by the owner of the steamboat *Charlotte Vanderbilt* in the Supreme Court of the State of New York against the owner of the yacht *Yosemite* for so negligently navigating the yacht as to run down the steamboat in the Hudson River. Upon writ of error from a judgment for the plaintiff in the Court of Appeals the judgment of the Court of Appeals was reversed and the cause remanded. It appeared from the evidence that the *Vanderbilt* had violated a rule requiring the blowing of whistles by passing steamers.

The Court held *inter alia* that there was error in leaving it to the jury whether upon the whole there was negligence in what was done or left undone by the *Vanderbilt,* and that the jury should have been charged as requested by the defendant below that

"8. As the proof is undisputed that the steamboat *Vanderbilt* and the yacht *Yosemite* were approaching each other head and head or nearly so, the law prescribes their duties respectively in regard to blowing their whistles."

Mr. Chief Justice Fuller said, at page 699:

"While * * * in construing and obeying the rules, due regard must be had to all dangers of navigation and to any special circumstances which may exist in any particular case rendering a departure from them necessary in order to avoid immediate danger, *the burden of proof lies on the party alleging that he was justified in such departure.* * * *"

The rule of the *Pennsylvania* was then restated:

"And it is the settled rule in this Court that when a vessel has committed a positive breach of statute she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so."

The lower Courts in the present case found affirmatively that the *Pomaron* was not justified in departing from the rule at the time the departure occurred.

In the case of *The Martello,* 153 U. S., 64, this Court held that the absence of the statutory fog horn, and the use, in its place, of a mouth-horn, placed the burden of proof on the *Willey* to show her freedom from fault; and the Court concluded:

"* * * we think the bark has failed to sustain the burden of proving that the want of a mechanical fog horn could not have contributed to the collision," although the steamer heard the fog horn before collision.

That the burden rested upon the *Pomaron* of proving at least that her statutory fault *did not*

contribute to the collision, is conceded by its counsel, who cite *Prince* v. *Eastern S. S. Co.*, 109 Maine, 395, as laying down the proper rule. In that case, the Court states at p. 402, the conclusions to be gathered from the decided cases to be:

"1. That the presumption is that a violation of the navigation rules contributed to the disaster.

"2. That the presumption is the strongest—made so as a matter of policy—but yet rebuttable.

"3. That the burden is on the owner in fault to rebut the presumption.

"4. That the presumption may be rebutted by showing in any way that the fault actually did not contribute.

"5. That the presumption is not rebutted so long as the proof is doubtful. It must exclude every other hypothesis. And this, we are of the opinion, is what is meant by the 'could not' rule."

The Maine case grew out of a collision between the motor boat *Carolyn* and the steamer *City of Rockland*, which occurred in the Kennebec River, at 7:15 p. m. The action was at law to recover damages sustained by the *Carolyn* and her owner. The *Carolyn* did not carry a stern white light, or range light, required by the rules. The jury returned a verdict for the defendant, and the case was reviewed by the Supreme Judicial Court of Maine on exceptions to rulings, and to the charge to the jury, upon the question of contributory negligence and the burden of proof resting on the plaintiff.

After a discussion of the authorities from which the Court drew conclusions as quoted above, the Court stated, at pp. 402-403:

"Therefore, in the case at bar the 'could not' rule, as above defined would seem applicable. The case is in the same class as those from which citations have been made. This being so, we are unable to see why the case should not fall precisely in the line of *The Pennsylvania* and other cases cited, where it was held that *it was impossible to determine whether as a matter of fact the fault contributed to the disaster or not, and therefore that the presumption against the vessel was not rebutted.* (Italics ours.) The plaintiff did not show range lights, as the rules require. The fact being admitted, upon the decisions cited the plaintiff cannot recover in any event, because it is impossible for him to show that the omission did not contribute, therefore the exceptions should not be sustained, and the case sent back for a useless trial."

The petitioner states in the brief, "Our con-"clusions with respect to the true doctrine of "*The Pennsylvania* are supported by the Su-"preme Judicial Court of Maine in *Prince* v. *Eastern S. S. Co.*, 109 Me. 395" (the above case).

If the petitioner concedes that this is the proper interpretation of the rule, it seems that he cannot complain that the lower Courts in this instance ruled harshly against the *Pomaron* on the burden of proof. Both Courts were obviously convinced that the proofs failed to show that the *Pomaron's* violation of the rule *did not* contribute to the collision. Moreover, it was affirmatively found by both Courts that the departure was not justifiable in fact. Under these circumstances, however leniently the rule may be applied, the *Pomaron* cannot escape the consequences, since the burden under either interpretation of the rule, whether "could not" or "did not," has not been sustained.

A number of cases are cited by the petitioner relating to the contribution of faults in collision cases. It appears from an examination of these cases that the several deciding authorities were satisfied on the evidence adduced that the vessel charged with contributory fault had sustained the burden of the rule, by removing all possible doubts as to her negligence.

In *Long Island R. R. Co.* v. *Killien,* 67 Fed., 365, the statute in question was an enactment of the New York legislature, and not a Congressional rule of navigation, as here. The extract quoted on page 21 of petitioner's brief refers to this particular statute, and is not to be taken as general in scope. The Court ruled that the fault in question did not contribute to the collision. P. 367.

The same Court, in *The Pocohuntas,* 217 Fed., 135, found that the alleged violation of statute had not been satisfactorily established, and that it *did not* contribute to the collision.

The Court's finding in *The Huntsman,* 11 Asp. M. C., N. S. 606, was to the effect that the action, taken by the starboard hand vessels mitigated the damage, which would have been more serious otherwise, and that it could not have been a contributing cause of collision. Pp. 607-608. As to the time when departure from the rule by the navigator of the starboard hand vessel is justifiable, it was said "it ought not to be made a complaint "against him that he waited too long or acted too "soon," when he uses his best judgment. Here, however, the *Pomaron's* officer knew and admitted that the time had not arrived for him to take action.

In *The Tempus,* XII Asp. M. C., N. S. 396, the starboard hand vessel, *Tempus,* did hold her

course and speed right up to the very jaws of collision. She then ported and hard-aported, but did not blow a signal.

The only question of fault against her was her failure at the last moment to sound her signal indicating that she was changing her course to starboard. As to this, Sir Samuel Evans said, at p. 399:

"I think that, even if the signal had been given by the *Tempus* when she ported and hard-aported, *it would not have had any effect upon the collision—that the want of that signal did not cause the collision nor contribute to the casualty.*"

In *The Franconia,* 2 P. D. 8, the situation was under the overtaking rule, involving very different circumstances to those that pertained here. The action of the leading vessel, the *Strathclyde,* in that case, cannot be likened to the *Pomaron's* movements, therefore.

The Court of Appeal, in reviewing the case of *The Corinthian* [1909], P. 260, distinguished and explained the decision in *The Bellanoch* [1907], A. C. 269. It was said, at page 277 in the report of the former case: "the *Bellanoch* was not making really a sea manœuvre at all, but, being imbedded more or less in the mud, was merely putting her engines astern for the purpose of freeing herself, *and not for the purpose of any manœuvre in relation to the other vessel.*" The case was not regarded as modifying or relaxing the general rule of proof.

In a later case, *The Ancona* [1915], p. 200, opinion by Bargrave Deane, *J.,* the same fault was considered as that charged against the *Bellanoch, viz.,* failure to sound a three-blast signal on putting the engines astern. The colliding vessel, the

Monica, was bound under the rules to keep clear, as the overtaking vessel. Although she had notice that the *Ancona* was turning, presumably to anchor, by reason of a special signal required by the harbor rules, the *Monica* attempted to pass too close to the *Ancona.* The latter was reversing her engine, but did not sound a three-blast signal. Both vessels were held at fault.

It is to be noted that the decision in *The Ancona* did not fall within the statutory rule of evidence repealed by Section 4 of The Maritime Conventions Act, 1911, on which stress is laid in the petitioner's brief, the cause of action having arisen after the repeal. Nevertheless, the Court apparently resolved all doubts against the *Ancona* because of infraction of the rule.

The dictum of Mr. Justice Brown in *The Umbria,* 166 U. S. 404, 420-421, is quoted by the petitioner, in support of the contention that the lower Courts here applied an erroneous test to the propriety of the *Pomaron's* porting, and that they considered only whether or not the collision would have occurred if the *Pomaron* had not ported. It was said in the *Umbria:*

"The propriety of certain manœuvres cannot be determined by the chance that the two vessels may, or may not, reach the point of intersection at the same time, but by the question whether their speeds can be stopped before their arrival at the point where their courses intersect."

This statement must be considered in relation to the inquiry to which it was directed, viz., regulation of speed in a fog. The test of moderate speed as laid down in that case, with respect to former article 18, may be said to fix the intersection of the courses as the point within which each vessel is bound to stop, since they must

maintain only such speeds as will render it possible to be stopped before arrival at that point, after they come in sight of each other. It cannot be understood, however, that the "certain manœuvres" referred to in the quoted extract were meant to embrace the movements of two vessels on crossing courses which are in plain sight of each other, and the navigators of which must necessarily consider "the chance that the two vessels may or may not reach the point of intersection at the same time." Otherwise, there would not be any meaning to the preliminary article of the rules, previously quoted, in which navigators are warned that a constant bearing presages danger of collision; that is, if the bearing of the crossing vessel does not change, it is known that the two will inevitably reach the point of intersection at the same time.

It must be concluded that the propriety of a manœuvre as between crossing vessels in sight of each other is very largely dependent on whether they would or would not reach the danger point simultaneously. In the present instance, the officer of the *Pomaron* could have ascertained with certainty, by taking occasional and reliable compass bearings, whether or not that situation did or did not exist; and, if the petitioner could have established that the situation existed in fact; that is to say, that the two vessels would have collided despite the *Pomaron's* change of course, this would have been persuasive evidence at least that the change of course "did not" contribute to the collision and the resulting damage to the respondents, although not that it "could not possibly" have caused or contributed thereto, perhaps. Indeed, that the Courts sought to ascertain this fact indicates that the "did not" rule was the test actually applied.

These decisions of the Second Circuit do not indicate that the Court in the present case has departed from the rule as originally laid down, or that the rule has been more harshly applied in this instance. On the contrary, the Court has shown now, as formerly, that proofs of freedom from fault must be *certain,* not merely *problematical,* where the infraction of a navigational rule is established; and that the burden of the proof is on the vessel violating the rule.

The petitioner also argues that the "did not" rule was applied in the *Agra,* L. R. 1 P. C. 501. It may be remarked that the Court in that case laid down the rule apparently quite apart from a statutory rule of evidence that a vessel which departs from the rules of navigation "takes upon herself the obligation of showing both that her departure was at the time it took place necessary, in order to avoid immediate danger, and also that the course adopted by her was reasonably calculated to avoid that danger." Pp. 504-505. The action of the *Pomaron* has not been shown to have been justifiable under either of these tests.

Whatever may be the distinction that was intended to be drawn by the Courts, if any, in the so-called "could not" and "did not" rules it cannot be doubted that all agree in effect that the proofs must be certain to relieve a colliding vessel of liability for violating a statutory rule of navigation, and the onus is placed on the vessel departing from the rules.

It may be conceded that uncertainty as to whether collision would or would not have occurred had neither vessel made any change does not invariably establish that a manœuvre adopted by one vessel, even though in violation of a rule of

navigation, necessarily contributed to the collision.

For example, if the *Pomaron* had starboarded in the present case when she ported, it would have been a violation of the rule as much as her porting was; nevertheless, we know now that such starboarding would not have contributed to collision, but would, in fact, have avoided it.

The petitioner's difficulty, however, arises from the fact that, owing to the contradictions in the testimony of the navigating officer of the vessel, including his contradiction of the entries made in his log of the bearing of the *Alleghany,* together with his failure to carefully watch the latter's compass bearing as she approached, it is rendered impossible to determine that the *Alleghany* would not have crossed the bow of the *Pomaron* had neither vessel made any change. If such were the case, *and if the entry in the Pomaron's* log of the hearing be accepted as correct *such must have been the case,* then the initial porting by the *Pomaron* not only may have but actually did contribute to the collision. *Ante,* p. 31.

It is submitted that the proofs have affirmatively established contributory negligence on the part of the *Pomaron;* but, if our contention in that respect is not sustained, the evidence is clearly insufficient to support a finding that the *Pomaron's* departure from the rules did not contribute to the collision and the conclusions of both lower courts were therefore proper.

FOURTH POINT.

THE ISSUES RAISED IN THIS PROCEEDING HAVE BEEN EXTINGUISHED BY REASON OF A COMPROMISE AND SETTLEMENT, WHICH OPERATES AS A BAR TO THIS PETITIONER.

After judgment had been entered on the mandate of the Circuit Court of Appeals, the petitioner filed a petition for limitation of its liability as owner of the *Pomaron*. Subsequently, claims were filed in due form, including those of the respondents herein, and an agreement of settlement and compromise among the parties concerned was later entered in the limitation proceedings. The issues in the latter were the same as those in the suits here, and all of the parties in the present suits were also parties to the limitation proceedings. Under these circumstances, the questions now raised are moot questions.

A motion is entered to dismiss the writ of *certiorari* on these facts, and a separate brief in support of the motion has been presented, which is respectfully submitted for the Court's consideration on this point.

LAST POINT.

THE WRIT OF CERTIORARI SHOULD BE DISMISSED, OR THE DECREES OF THE DISTRICT COURT AND OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED.

December, 1916.

Respectfully submitted,

J. Parker Kirlin,
Lawrence Kneeland,
D. Roger Englar,
William H. McGrann,
Of Counsel for Respondents.

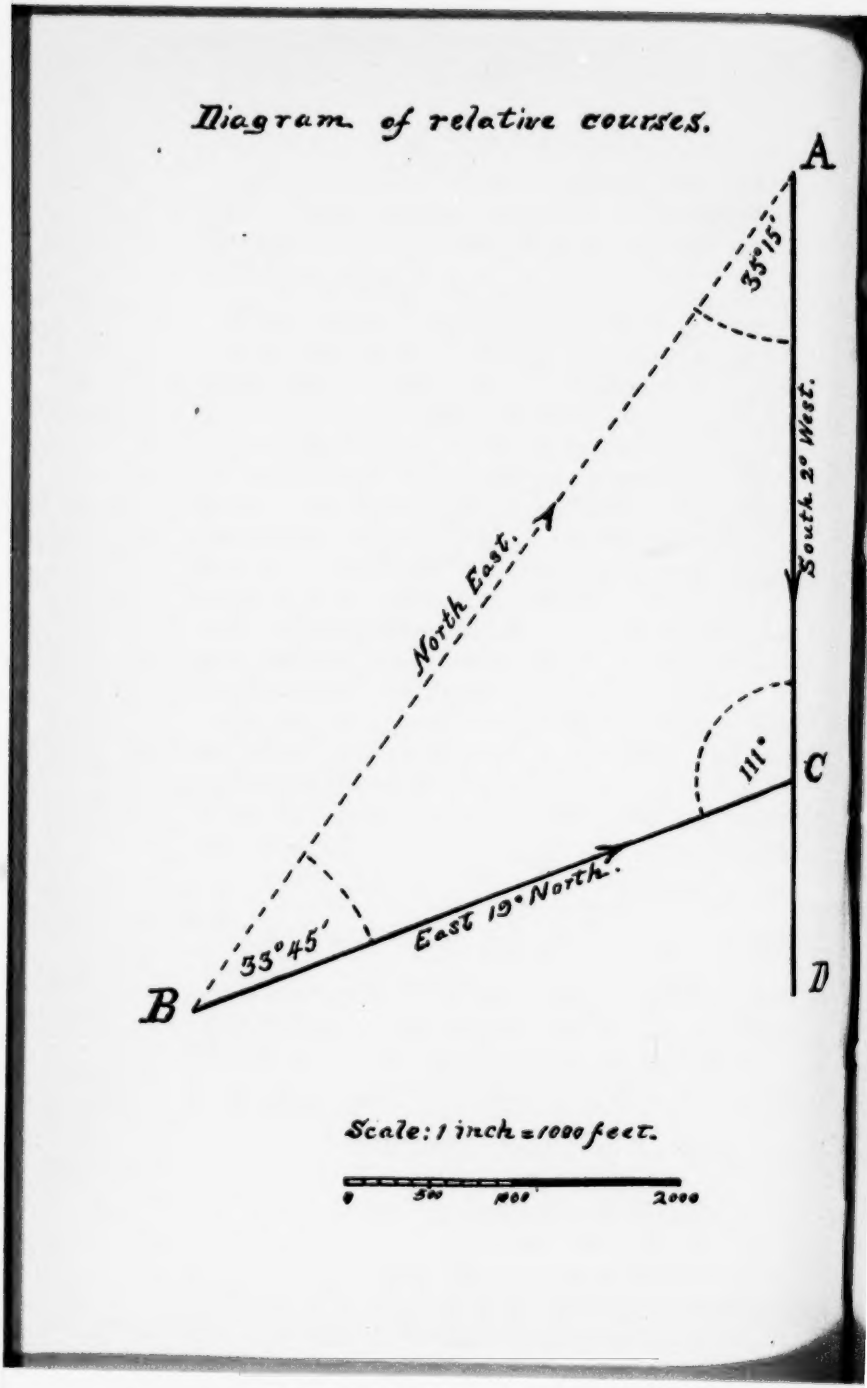
Diagram of relative courses.
A
35°15'
South 2° West.
North East.
111°
C
East 19° North.
33°45'
B
D
Scale: 1 inch = 1000 feet.
0
500
1000
2000

KEY TO DIAGRAM.

A=Position of *Alleghany,* bearing North East from the *Pomaron,* when the latter altered course.

B=Position of *Pomaron* when her one-blast whistle was sounded and helm ported.

C=Intersection of original courses protracted.

ACD=*Alleghany's* course, South 2° West.

BC=*Pomaron's* original course, North 19° East.

Angle at C=111°, intersection of courses AC and BC.

Angle at A=35° 15′, bearing of *Pomaron* from *Alleghany.*

Angle at B=33° 45′, or three points, bearing of *Alleghany* from *Pomaron.*

BA=*Alleghany's* bearing from *Pomaron,* North East, the distance B to A being one nautical mile, viz.: 6080, when *Pomaron* changed course.

BC=Distance of *Pomaron* from intersection of courses, 3760 feet, when *Pomaron* changed course.

AC=Distance of *Alleghany* from intersection of courses, 3618 feet, when *Pomaron* changed course.

AD=Distance *Alleghany* would have travelled, viz.: 4804 feet, while *Pomaron* travelled distance BC.

CD=Distance *Alleghany* would have passed intersection of courses, 1186 feet, when *Pomaron* reached C.

[NOTE: Refer to pages 34-37 and 41-42.]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

FURNESS, WITHY & COMPANY, LIMITED
(Respondent-Appellant),
Petitioner

AGAINST

YANG-TSZE INSURANCE ASSOCIATION, LIMITED, *et al.* (Libellants-Appellees),
Respondents

And 14 other suits

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Furness, Withy & Company, Limited, respectfully shows as follows:

On February 2, 1912, the petitioner's steamship *Pomaron* came into collision off the coast of Virginia with the Hamburg-American Line steamship *Alleghany*. The *Alleghany* sank and with its entire cargo became a total loss.

The owners of cargo on the *Alleghany* and their insurers filed libels *in personam* against the petitioner in the

United States District Court for the Southern District of New York. In some of the libels the Hamburg-American Line was joined as a party respondent, but limitation proceedings were instituted by that Company and, accordingly, further proceedings in this suit against it ceased. In the limitation proceedings instituted by the Hamburg-American Line it admitted its liability and upon paying into Court a small amount of freight money secured a decree relieving it from all further liability.

The suits against your petitioner were proceeded with in the District Court and resulted in the entry of a decree against it for $172,029.81 (Record, pp. 270–7). The opinion of the District Judge (Learned Hand, *J.*) is found at pp. 247–263 of the Record. Your petitioner appealed to the Circuit Court of Appeals which affirmed the decree of the District Court. The opinion is found at pp. 287–298 of the Record, and is reported in 215 Fed. Rep. 859.

Facts

The *Pomaron*, a small British steamer, bound from Baltimore, Maryland, to Leith, Scotland, was on an easterly course and sighted the *Alleghany* on her port hand about 10 or 12 miles distant. The *Alleghany* was on a southerly course, bound from New York to the West Indies. In this situation the *Pomaron* was the privileged vessel, and it was the duty of the *Alleghany* to keep out of her way. Both vessels were going at full speed,—the *Pomaron* making 9 knots an hour, and the *Alleghany* 11-1/2 knots. It was broad daylight, and the weather was absolutely clear. For three-quarters of an hour the vessels approached each other without change of course. As it afterwards transpired, no one on the *Alleghany* saw the *Pomaron* during this entire period. The only

man on the bridge was the quartermaster at the wheel and his view to starboard, from which direction the *Pomaron* was approaching, was cut off by a wind shield. The officer who should have been on the bridge was in the chart room making calculations from his observations.

The chief officer of the *Pomaron*, who was on the bridge, kept close watch upon the *Alleghany* during all the time that the two vessels were approaching each other. He was unable to see any sign of life on the *Alleghany*.

When the vessels were about a mile apart, the chief officer of the *Pomaron* blew a blast upon the whistle in order to attract the attention of the *Alleghany*, and at the same time he ordered the helmsman to port a little. This resulted in the *Pomaron* going off her course about a point to the southward, thus giving the *Alleghany* a little more clearance (fol. 464).

The blast of the *Pomaron's* whistle brought the first officer of the *Alleghany* out of his room and, seeing the *Pomaron* for the first time, he blew two blasts, put his helm hard ~~aport~~ starboard, and his engine telegraph at full speed ahead twice (*Alleghany's* Log, 734–5).

The *Alleghany's* first officer thus described the situation (711):

"I omitted during a period of about three-quarters of an hour to keep a lookout to starboard, and therefore never noticed the *Pomaron* crossing my course until the latter gave a signal to keep clear and had already approached so near that a collision was unavoidable. There was no lookout man at the time and the steersman's lookout, to starboad, was blocked by a wind screen. For a long period of time I neglected to keep a lookout and therefore first saw the crossing steamer *Pomaron* only at the last moment."

As soon as the *Alleghany* blew two blasts, which indicated that she was directing her course to port and attempting to cross the *Pomaron's* bow, the chief officer of the *Pomaron* reversed his engines full speed and ordered the helm hard aport in a last effort to escape collision or minimize the blow, but collision was inevitable, and the *Pomaron's* stem struck the *Alleghany's* starboard quarter about 100 feet from the stern, cutting into her so that in a few hours she sank.

" That the negligence of the *Alleghany* was inexcusable and even unparalleled, seemed to be admitted."

The officer in command

" had no idea that there was any vessel anywhere in his vicinity. And for three-quarters of an hour prior to the collision there was no lookout " (Opinion of Circuit Court of Appeals, Rec., p. 295; 215 Fed. Rep. 865).

Opinion of the District Court

Notwithstanding the gross and unparalleled negligence of the *Alleghany*, the District Judge felt compelled on the authority of *The Pennsylvania*, 19 Wallace, 125, to condemn the *Pomaron* also for porting her helm.

He reached this result with extreme reluctance and only because, under the interpretation which he placed upon the decision of this Court in *The Pennsylvania*, he could see no escape from such an unjust result. As he said:

"I have already said that the result seems to me extremely inequitable and I should be glad if an appellate court could find otherwise, but while the holding-on ship is charged with the burden of proof, I can see no alternative. The case is one which shows the necessity for the proposed new rule which will not hold each ship *in solido*, but will apportion liability according to fault. Had that been open to me, I should have attributed a very small

fraction of blame indeed to the *Pomaron*. As it is, under what I cannot help calling a very mechanical and arbitrary rule of law, I see no escape from assessing this ship with the full loss for a trifling violation of the rule, for it remains true, however we may regret the result, that only unfounded speculation can justify us in saying that the violation could not have produced the collision" (787–9).

Opinion of the Circuit Court of Appeals

The Circuit Court of Appeals agreed with the District Court that under the rule laid down in *The Pennsylvania*,

"The burden of proof rests upon the *Pomaron* to show that the fault she committed could not have been one of the causes of the collision,"

and that

"Whether the collision would or would not have occurred if the *Pomaron* had held her course and speed cannot now possibly be determined because of the doubt which exists as to the exact bearing of the *Alleghany* from the *Pomaron* at the time" (Rec., p. 293; 215 Fed. Rep. 863).

It being impossible to establish with certainty what would have happened if the *Pomaron* had not ported slightly, the Court concluded that the *Pomaron* had not sustained the burden which rested upon her and, therefore, affirmed the decree of the District Court. The Court also referred to the utterly inexcusable character of the disaster, and added:

"It is difficult to see how it all happened unless both vessels were in fault and failed to exercise reasonable care. Plain common sense constrains one to such a conclusion. To exonerate either of them under such conditions can be justified only if upon the closest scrutiny of the navigation of each vessel it can be discovered that one of them was free from all culpable blame" (Rec., pp. 294-5; 215 Fed. Rep. 865).

Apparently, therefore, it was the opinion of the Circuit Court of Appeals that where statutory fault is charged the rule so often laid down by this Court, that in case of gross fault on the part of one vessel any doubts regarding the conduct of the other vessel should be resolved in her favor, does not apply. Certainly, unless the distinction thus suggested is sound, no case has ever better merited the application of the rule expressed by Mr. Justice Brown in *The Umbria*, 166 U. S. 404, 409:

> " Indeed, so gross was the fault of the *Umbria* in this connection, that we should unhesitatingly apply the rule laid down in *The City of New York*, 147 U. S. 72, 85, and the *Ludvig Holberg*, 167 U. S. 60, 71, that any doubts regarding the management of the other vessel or the contribution of her faults to the collision should be resolved in her favor."

When the faults of the *Umbria* and of the *Alleghany* are compared, the fault of the *Umbria*, which this Court considered was gross, appears as but a venial error.

Questions Presented for the Consideration of this Court

1. Under the rule of *The Pennsylvauia*, 19 Wallace, 125, is it sufficient for a vessel charged with a statutory violation to show that the fault did not contribute to the disaster, or must she also show that it could not have done so?

2. Does the burden rest upon a vessel charged with a statutory violation to show that the disaster would have occurred irrespective of any action or inaction on her part?

3. Is it necessary to show that the statutory violation contributed to the disaster, or may the "but for" rule be relied upon to establish liability?

4. Is the rule that in case of gross fault on the part of one vessel any doubts regarding the management of the other vessel or the contribution of her faults, if any, to the collision should be resolved in her favor, inapplicable where the fault charged is a statutory violation?

5. Is the privileged vessel justified in changing her course when there is a distinct indication that the burdened vessel is about to fail in her duty?

The Pennsylvania (*supra*) was decided by this Court in 1873. It lays down a salutary rule, which has been applied in very many cases which have since arisen. In this case, however, it has been carried to such an extent as almost to

"make the vessel guilty of the infringement a sort of outlaw of the seas,"

as was said by the Privy Council in *The Fanny M. Carvill*, 13 App. Cas. 455, 459. The rule in regard to statutory violations in England was established by statute. The severity of this statute the English courts found themselves forced to modify by construction, but even this modification was found insufficient to prevent injustice, and by Section 4 of the Maritime Conventions Act of 1911, passed in order to give effect to the International Convention on Collisions signed at Brussels in 1910, the law was changed so that a vessel charged with statutory violation need only show that the breach did not in fact contribute to the collision. Your petitioner believes that the law

of the United States is the same as that of England since the Maritime Conventions Act of 1911, and that the Circuit Court of Appeals erred in giving a contrary construction to the decision of this Court in *The Pennsylvania.*

This Court did not in that case intend to lay down the "could-not" rule, but only the "did-not" rule, which was then in force in England as shown by the case of *The Fenham*, cited in the opinion. All that this Court intended was to require positive proof that the fault did not in fact cause the disaster; mere possibility or probability was insufficient. But it never intended to require in addition to such positive proof evidence that the fault could not have caused the disaster. The "could not" rule, even in England, was created by statute subsequent to the decision of *The Pennsylvania* and has now been abolished there.

Although the purpose of this Court in *The Pennsylvania* would seem not to be ambiguous, much confusion has resulted in the lower courts over whether this Court meant to say "did not" or "could not." Besides the decision of the Circuit Court of Appeals for the Second Circuit in this case, the decision of the Circuit Court of Appeals for the Sixth Circuit in *Hawgood Transit Co.* v. *Mesaba S. S. Co.*, 166 Fed. Rep. 697, considers the rule of *The Pennsylvania* as "could not." It is there said (702):

> "The fact that a ship was at the time of collision in actual violation of a statutory rule designed to prevent collisions throws the burden upon her to show that such violation could not have contributed to the collision" (citing *The Pennsylvania* and other cases).

On the other hand, in the case of *Gring* v. *Bensten*, decided by the Circuit Court of Appeals for the Fourth

Circuit, September 8, 1914 (apparently not yet reported), a copy of the opinion in which is annexed to this petition, that Court held that a vessel charged with a statutory fault, in being out of the course prescribed by the rules, need only show by a preponderance of testimony that her fault did not contribute to the collision.

An interesting illustration of the confusion resulting from the different views of the true rule of *The Pennsylvania* is shown by the case of *Prince* v. *Eastern S S. Co.*, 109 Me. 395.

In view of this confusion as to the true rule in cases of statutory fault, and as to the meaning of *The Pennsylvania;* and in view of the fact that by the Maritime Conventions Act of 1911 Great Britain has returned to the "did not" rule; and in view of the differences among the Circuit Courts of Appeals, your petitioner respectfully submits that it is highly desirable in the interest both of general navigation and international commerce that this Court should now review and settle once for all the important questions presented.

The fifth question calls for an interpretation of the "Special Circumstance Rule." The navigating officer of the *Alleghany* was absent from the bridge, there was no lookout and the wheelman was prevented by a wind shield from seeing anything in the direction from which the *Pomaron* was approaching. The navigating officer of the *Pomaron* was unable to see anyone on the *Alleghany's* bridge, and as there was no indication whatever that the *Alleghany* was changing her course, but, on the contrary, every indication that she was not, it was manifest that there would be a collision unless someone did something (462, 534–5). In this condition of affairs, Article 27 of the International Regulations,

entitled "General Prudential Rule," was clearly applicable. That rule provides:

"In obeying and construing these rules due regard shall be had to all dangers of collision and to all special circumstances which shall render a departure from the above rules necessary in order to avoid immediate danger."

The Circuit Court of Appeals refused to excuse the *Pomaron* under this rule because the navigating officer of the *Pomaron* testified, in answer to the question:

"Q. In order to get the matter quite plain on the record, will you tell us when it was in your judgment the circumstances had developed so that collision became unavoidable unless you did something?"

"A. Really not until the *Alleghany* had given me two blasts of the whistle" (Rec., p. 291; 215 Fed. Rep. 862).

The decision of the Circuit Court of Appeals results in the laying down of a rule for navigators that the privileged vessel must hold her course and speed up to the very moment that collision becomes inevitable unless action is taken by the burdened vessel, and allows no leeway whatever for the reasonable exercise of discretion by a navigating officer in a situation which has been well described as "one of the most difficult tasks imposed upon the seaman by the law," Marsden on Collisions, 6th ed., page 413.

The rule laid down by this Court in *The Delaware*, 161 U. S. 459, 469, is as follows:

"The cases of *The Britannia*, 153 U. S. 130, and *The Northfield*, 154 U. S. 629, must be regarded, however, as settling the law that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty."

As this Court pointed out in that case, this rule is of the utmost importance, but it is believed that it is of no less importance that navigators should not be bound by a

harsh and arbitrary interpretation of the rule which will prevent the exercise of the judgment and discretion which Article 27 was intended to provide for and the necessity of which is recognized by all. The exception pointed out in the quotation from *The Delaware*, "some distinct indication that she is about to fail in her duty", was made advisedly, and is of great practical importance. The decision of the Circuit Court of Appeals in effect nullifies this exception.

In the interest of safe navigation at sea, it is submitted that this Court should review a decision of the Circuit Court of Appeals which holds a navigator at fault for a trifling departure from Article 21 occurring at a time when the two vessels had approached from a distance of ten miles apart to a distance of not more than one mile apart without any change of course by the burdened vessel and when the navigating officer of the privileged vessel not only had good ground to believe that the burdened vessel was about to fail in her duty but when the real fact was that the burdened vessel was not even aware of the presence of the privileged vessel.

Your petitioner will present, in connection with this petition, a brief discussing more fully the contentions above stated with citation of authorities.

WHEREFORE your petitioner prays that this Honorable Court will cause a writ of *certiorari* to be issued requiring the United States Circuit Court of Appeals for the Second Circuit to certify the record herein so that this Court may act thereon as of right and according to law ought to be done.

And your petitioner will ever pray.

FURNESS, WITHY & COMPANY, Limited,
By BURLINGHAM, MONTGOMERY & BEECHER,
its Proctors

STATE OF NEW YORK, }
County of New York, } ss:

CHARLES C. BURLINGHAM, being duly sworn, deposes and says: That he is one of the proctors for the petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge and belief; that the reason why this verification is not made by the petitioner is that the petitioner is not within this District, and deponent is its proctor and familiar with the facts stated in the petition.

CHARLES C. BURLINGHAM.

Sworn to before me, this }
9th day of April, 1915. }

ROSCOE H. HUPPER,
[SEAL] Notary Public,
New York Co., No. 1621.

I HEREBY CERTIFY that I have examined the foregoing petition and that in my opinion the same is well founded and is entitled to the favorable consideration of this Court.

Dated, New York, April 9, 1915.

NORMAN B. BEECHER.

SIRS:

TAKE NOTICE that the foregoing petition for a writ of *certiorari* will be presented to the Supreme Court of the United States on Monday, April 12th, 1915.

Dated, New York, April 9, 1915.

BURLINGHAM, MONTGOMERY AND BEECHER,
Proctors for Petitioner.

To

MESSRS. CONVERS & KIRLIN,
Proctors for Yang-Tsze Insurance Association, Ltd., *et al.*, and Nord-Deutsche Insurance Co., *et al.*

MESSRS. KNEELAND, HARISON & HEWITT,
Proctors for Federal Insurance Co. *et al.*

MESSRS. BARRY, WAINWRIGHT, THACHER & SYMMERS,
Proctors for Walter Oloffson, *et al.*; M. H. Silvera & Hazan & Co.

MESSRS. WILLIAMS & STEVENSON,
Proctors for Boston Insurance Co.

MESSRS. HARRINGTON, BIGHAM & ENGLAR,
Proctors for Walter Despard, Eugene J. F. Coleman, Marshall K. Weidensaul, Francis W. Van Praag, Orton G. Orr, Laura Moore and Louis Bertschmann.

H. SNOWDEN MARSHALL, ESQ.,
Proctor for United States of America.

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT

No. 1245

CHARLES GRING, Claimant of Steam Tug "*Curtin*," Appellant

versus

WILLIAM S. BENSTEN, Appellee

APPEAL from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

(Argued May 11, 1914. Decided September 8, 1914.)

Before PRITCHARD and WOODS, Circuit Judges

RALPH H. RIDDLEBERGER (RIDDLEBERGER and ROPER on brief), for appellant, and R. H. HUGHES, Jr., (HUGHES, LITTLE and SEAWELL on brief), for appellee.

WOODS, *Circuit Judge:*

On 18 December, 1911, the gasoline launch *Cecilia* was going up the Elizabeth River from Hampton Roads to Norfolk. The tug *Curtin* was coming down the river on the south or Portsmouth side of the river near the middle of the stream on its way to Pinner's Point. The tug *Pinner's Point* with a barge alongside was crossing the river from Pinner's Point to Fort Norfolk. The *Cecilia* and the *Curtin* collided astern the *Pinner's Point* with the result that the *Cecilia* was sunk. The District Court held the *Curtin* entirely at fault and adjudged that William S. Bensten, owner of the *Cecilia*, should recover of the

Curtin and its owners fifteen hundred and sixty-six dollars and fifty-two cents.

There is no substantial difference as to the law. While the testimony in its details is irreconciliable and confusing, we think the controlling fact is established by the preponderance of the evidence. The witnesses differ somewhat as to the precise point of collision, but they agree that it occurred near mid-stream at about 5:45 in the afternoon.

The master of the *Cecilia* admits hearing two whistles from the *Pinner's Point*, and the answer of two whistles from another vessel which turned out to be the *Curtin*, indicating the intention of the answering vessel to pass astern of the *Pinner's Point*.

The fact that the master of the *Cecilia* held his course up and gradually across the stream and astern of the *Pinner's Point* without giving any signal and with knowledge from the signal of the *Curtin* that a down-going vessel was about to pass astern of the *Pinner's Point*, would be fatal to his claim of exemption from blame, if this course of conduct contributed as a proximate cause to the collision. But we think the preponderating evidence shows that it did not. The master of the *Cecilia* testified that he did not signal the *Pinner's Point* because she was so far away that a signal was unnecessary. The master of the *Norfolk* and the master of the *Pinner's Point*, both impartial witnesses, corroborate his statement that the *Cecilia* and the *Curtin* were showing green to green and would have passed each other safely but for the sudden change of course of the *Curtin* toward the *Cecilia*, after the *Pinner's Point* had passed.

There was evidence that the *Cecilia* was out of the course prescribed by the rules, and this together with the signal of the *Curtin* might well be held to impose upon

the *Cecilia* the burden of keeping out of the way of the *Curtin*. Assuming that she was bound to keep out of the course of the *Curtin*, the evidence that there was no danger to either vessel until the *Curtin* changed her course tends to show that she discharged this duty—that she did nothing which put either vessel in danger, and that the cause of the collision was the *Curtin's* change of course. Singleton, the mate of the *Curtin*, who was navigating her is alone in his testimony that the collision was caused by the *Cecilia* changing her course and trying to cross his bow, and that the master of the *Cecilia* when taken on his vessel and asked his reason for the change did not deny it.

Acts of negligence which do not contribute to the accident as a proximate cause do not render a ship liable, even under the American as distinguished from the English rule of liability. *The Oregon*, 158 U. S. 186; *The City of Macon*, 121 Fed. 686; *The Lord O'Neill*, 66 Fed. 77; Marsden on Collisions at Sea (6th Ed.) 14.

Whether negligence imputed is the proximate cause or merely collateral or immaterial is a question of fact, and where the conclusion of the District Court is not against the preponderance of the evidence it cannot be disturbed.

It seems clear beyond dispute that the proximate cause of the collision was the negligent change of course by one or the other of the vessels. Enough of the evidence has been set out to show that the preponderance supports the finding of the District Judge that the courses of the two vessels were safe, that it was the *Curtin* that suddenly changed her course and struck the *Cecilia;* and that the danger of such a change would have been evident if the *Curtin* had had an adequate watch.

Affirmed.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1914

FURNESS, WITHY & COMPANY, LIMITED (Respondent-Appellant),
Petitioner,

AGAINST

YANG-TSZE INSURANCE ASSOCIATION, LIMITED, *et al.* (Libellants-Appellees),
Respondents.

And 14 other Suits.

BRIEF FOR PETITIONER

FIRST POINT

THIS COURT DID NOT IN THE PENNSYLVANIA LAY DOWN THE RULE THAT A VESSEL GUILTY OF A STATUTORY VIOLATION MUST SHOW NOT ONLY THAT HER FAULT DID NOT CONTRIBUTE TO THE DISASTER, BUT ALSO THAT IT COULD NOT HAVE DONE SO. THE LOWER COURTS, THEREFORE, ERRED IN PLACING UPON THE POMARON THE BURDEN OF SHOWING THAT HER INITIAL PORTING COULD NOT HAVE CONTRIBUTED TO THE COLLISION, ENTIRELY IRRESPECTIVE OF WHETHER IT DID IN FACT CONTRIBUTE AND NOTWITHSTANDING THAT IT ACTUALLY DID NOT CONTRIBUTE.

The Pennsylvania was a case of collision in fog between the steamer *Pennsylvania* and the bark *Mary Troop*, which violated the statutory rule by ringing a bell

while under way instead of blowing a horn. This Court said, 19 Wall. 125, 136–7:

" But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. *In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been.* Such a rule is necessary to enforce obedience to the mandate of the statute. In the case of *The Fenham*, the Lords of the Privy Council said, ' It is of the greatest possible importance, having regard to the admiralty regulations, and to the necessity of enforcing obedience to them, to lay down this rule; that if it is proved that any vessel has not shown lights, the burden lies upon her to show that her noncompliance with the regulations was not the cause of the collision.' In some cases it is possible to show this with entire certainty. In others it cannot be. The evidence in the present case leaves it uncertain whether if a foghorn had been blown on the bark, it would not have been heard sooner than the bell was heard, and thus earlier warning have been given to the steamer—seasonable warning to have enabled her to keep out of the way."

The language we have italicised is no authority for the proposition, so often sought to be adduced, that the violation of the statutory regulation imposes the burden of showing not merely that the violation did not contribute, but also that it could not have contributed to the disaster. This is apparent when we consider that the Court was there dealing with a case where it had not been shown that the fault did not in fact contribute to the disaster, but where only such a possibility or probability had been shown.

Neither the District Court nor the Circuit Court of Appeals expresses an opinion that the *Pomaron* contributed to the collision, having considered that point immaterial;

but their findings of fact sufficiently show that she did not contribute to the collision. Both courts rest with the finding that it is impossible to determine whether the collision would or would not have occurred if the *Pomaron* had held her course and speed.

The rule which this Court intended to lay down in *The Pennsylvania* is the rule which at that time was established by statute in England. At page 135 of this Court's opinion in *The Pennsylvania* the provisions of the British Merchant Shipping Act are stated, and the Court adds,

"Our own statute does not contain this provision expressed, but its meaning is the same."

The British Act referred to in the opinion in *The Pennsylvania* was 25 and 26 Vict., c. 63, s. 29. Under that Act a vessel guilty of a statutory violation needed only to show that her non-compliance with the regulations was not the cause of the collision. This appears clearly from *The Fenham*, L. R. 3 P. C. 212, which is cited in the opinion of this Court in *The Pennsylvania*. It is also shown by the discussion of the various British Acts in *The Khedive*, 5 App. Cas. 876, 891-3, and in *The Fanny M. Carvill*, 13 App. Cas. 454, 458-9. Of the effect of a similar provision in a slightly earlier Act, Pollock, *C. B.*, said in *Morrison* v. *General Steam Navigation Co.*, 8 Ex. 731, 738:

"And if it could be clearly made out that a vessel having no light had been run down by another, from sheer carelessness and negligence in not keeping a good lookout, we agree with Mr. Watson in thinking that in such a case the plaintiff would have had a right to compensation from the defendants."

It was not until after the decision in *The Fenham* that the British rule was changed by the enactment of 36 and

37 Vict., c. 85, s. 17, which was interpreted so as to impose upon the offending vessel the burden of showing not merely that her fault did not cause the disaster, but that it could not by any possibility have contributed to it. *The Fanny M. Carvill* (*supra*) at p. 459.

The history of the English legislation and cases decided thereunder is concisely stated in Marsden on Collisions, 6th Ed., pp. 39–42.

It is apparent, therefore, that the rule which the Circuit Court of Appeals has applied in this case was not the English rule in effect at the time of the decision in *The Pennsylvania* and with which this Court in *The Pennsylvania* agreed, but was the later English rule created by a subsequent Act whose policy has never been accepted in this country and which itself has now been abandoned in England.

This harsh statutory rule, the tendency of which was to make a vessel guilty of infringement of a regulation, "a sort of outlaw of the seas," as was said in *The Fanny M. Carvill* (*supra*) at p. 459, has now been repealed by Section 4 of the Maritime Conventions Act of 1911, 1 & 2 Geo. V., c. 57. In that case it was held that mere proof that the infringement of the regulation did not in point of fact contribute to the collision was inadmissible. That is also the real effect of the decision of the Circuit Court of Appeals in this case.

The effect of this repeal is stated in an introductory note to "The Maritime Conventions Act, 1911," by E. S. Roscoe and Helenus M. Robertson, London, 1912, page 10, as follows:

'The effect of the removal of this provision will be that a ship will only be held to be in fault for a breach of the collision regulations if, in the opinion of the Court,

such breach did *in fact* contribute to the collision, even though the circumstances did not make departure from the regulation in question necessary. It follows that any inquiry as to whether a breach of a regulation *might possibly* have contributed to a collision will be henceforth irrelevant and the law will now be unquestionably clearer."

Thus the English law now coincides with what we contend is our law as laid down in *The Pennsylvania*, and is the same as the English law at the time the case of *The Pennsylvania* arose. The harsh English statutory "could not" rule never had any warrant in our legislation or decisions and could have been applied by the Circuit Court of Appeals in this case only upon failure to observe that it was not the rule expressed in *The Fenham* on which the case of *The Pennsylvania* was decided. The District Court and the Circuit Court of Appeals clearly erred, therefore, in holding that the *Pomaron* must show that her porting could not have contributed to the collision.

SECOND POINT

THE POMARON DID NOT CONTRIBUTE TO THE COLLISION.

The Circuit Court of Appeals found it "difficult to see how it all happened unless both vessels were in fault and failed to exercise reasonable care." But that a vessel making 11½ knots an hour, with no lookout and no officer on the bridge for three-quarters of an hour, might come into collision with another vessel, even without fault on the part of the other vessel, is, after all, perhaps, not so extraordinary.

The *Alleghany* had no officer on the bridge; she had no lookout. She was not even aware of the *Pomaron's* presence, and in consequence she made no attempt to perform the duty resting upon her of keeping out of the *Pomaron's* way. When she did discover the *Pomaron* her disregard of rules continued. In starboarding she violated Article 19 of the Regulations, the starboard-hand rule, and Article 22, which required that she should not cross ahead of the *Pomaron*. In continuing at full speed she violated Article 23. Everything she did was wrong. With respect to starboarding the District Judge said that the *Pomaron's* chief officer "was suddenly confronted with the very worst manœuvre which his adversary could execute" (784).

Any contributory negligence on the part of the *Pomaron* is expressly negatived by important considerations. Up to the time of the *Pomaron's* signal the *Alleghany* had not seen the *Pomaron* at all, and up to then both vessels had kept their course and speed. When that signal was given the chief officer of the *Alleghany* said that the collision was unavoidable:

> "I * * * never noticed the *Pomaron* crossing my course until the latter gave a signal to keep clear and had already approached so near that a collision was unavoidable" (711).

The master of the *Alleghany* said that when he saw the *Pomaron* she was "quite close to and a collision unavoidable" (708-9). The chief officer of the *Pomaron* when he ported saw that collision would occur unless he did something, if the *Alleghany* kept going as she was. Thus the judgment of three responsible mariners coincided as to the situation being fixed for collision when the *Pomaron* ported.

It is obvious that up to this time nothing that the *Pomaron* did affected the movements of the *Alleghany*. It is equally obvious that the signal of the *Pomaron*, accompanied by her porting, did not mislead the *Alleghany*. Under Article 28 of the International Regulations—in which no provision is made for alarm blasts (513)—one blast, such as the *Pomaron* gave (507), means "I am directing my course to starboard," and by porting the *Pomaron* did go to starboard. In this respect the case is entirely different from *The Pennsylvania*, where the bark gave a false signal, indicating that she was at rest, although she was in fact under way. 19 Wall., at p. 135. So far as the *Pomaron's* porting had any effect on the *Alleghany*, this case should therefore be considered as if the *Pomaron* had always been and remained on the course on which her porting placed her.

The *Pomaron's* porting did not embarrass the *Alleghany*, but on the contrary gave her more clearance (464). The Circuit Court of Appeals said that it was not free from doubt whether the *Alleghany* changed her course just before the collision. Her log shows, however, that the helm was put hard-a-starboard (735). Instead of starboarding a careful steamship officer instinctively ports his helm in an emergency. Either the *Alleghany* did not act at all with respect to the *Pomaron's* signal and change of course, of which she was promptly apprised, or, if she did act, she did the exact opposite of what was naturally to be expected. In either case the *Pomaron* is not chargeable with fault with respect to what the *Alleghany* did.

The *Alleghany* being thus apprised of all that the *Pomaron* did or intended, the situation as to contributory fault of the *Pomaron* is the same as that of the *Traverse*

in the case of *The Livingstone*, 113 Fed. Rep. 879, decided by the Circuit Court of Appeals for the Second Circuit. In that case the violation relied on was the absence of a red light on the *Traverse*. The Court said, pp. 882-3:

"He (the mate of the *Livingstone*) could see the *Traverse* while her signal notified him as plainly as any lights would have done that she was directing her course to starboard. Indeed, when pressed upon cross-examination, this witness admitted that the one whistle heard by him gave him all the information needed, and that the absence of the red light made no difference. * * *

"But it must be accepted that the position when the last signal sounded was one of safety, and that peril and disaster came thereafter only as the result of an amazing piece of stupidity in the navigation of the *Livingstone*. For this reason we cannot hold that failure by the *Traverse* to display a red light was a fault contributing to the disaster".

See also *Long Island R. R. Co.* v. *Killien*, 67 Fed. Rep. 365, 367.

What could the *Pomaron's* chief officer have done except to port? Collision being in his judgment imminent, he could not keep his course and speed. Had he stopped or reversed he would have thrown his vessel directly in front of the *Alleghany*, if at the last moment she ported her helm, as it was her duty to do (534, 562-3). Had he starboarded he would have turned the *Pomaron* directly towards the *Alleghany* (538–540, 543). This would thwart the *Alleghany* in every proper effort, for if she should port the two vessels would be coming together, and if she should stop and reverse, she would be directly across the *Pomaron's* bows. In *The Umbria*, 166 U. S. 404, 412, where the *Iberia* ported her helm upon hearing the *Umbria's* first whistle on her port bow, this Court said:

"We should be unwilling to state that it was necessarily a fault on her part to port her helm two points, the effect of which would be to give the *Umbria* more room."

And in the *Britannia*, 153 U. S. 130, reported in the Circuit Court in 42 Fed. Rep. 67, the *Beaconsfield*, though held at fault for stopping and backing across the bows of the *Britannia*, was not held at fault for porting, either in this Court or in the Courts below.

The District Judge evidently thought that it was essential for the *Pomaron* to show that the accident would have occurred had she not ported. He judged her by the "but for" rule, and the Circuit Court of Appeals pursued the same line of reasoning. The cases cited above, and *Railroad Co.* v. *Reeves*, 10 Wall. 176, sufficiently show, we believe, the error of such reasoning.

THIRD POINT

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE POMARON'S PORTING WAS NOT EXCUSED BY SPECIAL CIRCUMSTANCES.

Article 27 of the International Regulations requires that due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render departure from the rules necessary in order to avoid immediate danger. If by reason of the privileged vessel continuing to hold to the rule collision would be inevitable there is "immediate danger." In *The Delaware*, 161 U. S. 459, 468, this Court said:

"The weight of English, and, perhaps, of American authorities is to the effect that, if the master of the preferred steamer has any reason to believe that the other will not take measures to keep out of her way, he may treat this as a 'special circumstance' under Rule 24 'rendering a departure' from the rules 'necessary to avoid immediate danger.'"

The chief officer of the *Pomaron* when he ported had good reason to believe that the *Alleghany* would not take steps to keep out of his way because he could see nobody on her bridge, and it in fact turned out that no lookout in the direction of the *Pomaron* was being kept. The *Alleghany* had been rushing on for three-quarters of an an hour as blind to her own impending danger and that in which she was placing the *Pomaron* as if her helm had been lashed and all her crew dead. In these circumstances the *Pomaron* was not at liberty not to do something to avert the danger, although it was caused entirely by the *Alleghany's* fault.

In *The Delaware* (*supra*) this Court said (468):

"That her primary duty is to keep her course is beyond all controversy. It is expressly required by the 19th rule of the original International Code (Rev. Stat., sec. 4233), and of the 16th rule of the Revised Code of 1885, and doubtless applies *so long as there is nothing to indicute that the approaching steamer will not discharge her own obligation to keep out of the way.*" (Italics ours.)

The decision of the Circuit Court of Appeals denied the *Pomaron* the benefit of this most important qualification of the rule as it was applied in *The Delaware* and in *The Umbria*, 166 U. S. 404. We submit that its decision creates an impossible standard.

The judgment of the *Pomaron's* chief officer told him that unless he did something his vessel would be run down. He may not be judged too harshly for what he did at the last moment. In *The Huntsman*, 11 Asp. M. C. 601, the burdened vessel failed to keep out of the way because the officer in charge of the bridge was diverted by signalling. The *Rameses*, the privileged vessel, kept her course and speed until it appeared that the *Huntsman* was taking no measures to keep out of the way. She then slowed her

engines and sounded a long whistle to attract the attention of the *Huntsman*, and soon afterwards put her engines full speed astern and sounded three short blasts. The *Huntsman* continued on at high speed, apparently attempting to cross ahead of the *Rameses* and, swinging under a starboard helm, struck the stem of the *Rameses*. Various charges of fault were made against the *Rameses*, with respect to which Bargrave Deane, *J.*, said (608):

"Now, it is said: 'Your fault was that you did stop when you ought not to have done so, and you never reversed and yet gave a misleading three-blast signal.' Upon this question as to altering her speed by a vessel whose duty it is to keep it under Article 21, it is almost impossible to lay down any fixed rule. Good seamanship requires that in any case a time may come when the course or speed or both of a stand-on ship may and ought to be altered. The difficulty in such a case is to decide at what exact time such alteration not only may be but ought to be made. It is impossible, mathematically speaking, to fix that time—various ingredients come into the matter. * * * The burden of taking action and de parting from the rule is cast upon that officer, who has to determine when that point of departure ought to occur. *It must not be pressed too severely in any case. If the officer is carefully watching the movements of the other vessel and endeavoring to do his best to judge when the time shall arrive for him to act, it ought not to be made a complaint against him that he waited too long or he acted too soon.* * * * There was a manifest error of judgment as to the place in the intersecting courses where the vessels would relatively pass each other, with the result that instead of porting and passing under the stern of the *Rameses* the *Huntsman* kept her course and so did not keep clear of the *Rameses* * * *. In my opinion, if he (the officer in charge of the *Rameses*), had not slowed his engines in all probability he would have been cut in two by this big ship instead of hitting her amidships on the starboard side. I think the conduct of the officer of the *Rameses* was not blameworthy, but that he did the best he could in extremely difficult circumstances, and that the collision was far less serious than it would have been if he had kept his speed without slowing. * * * I think the *Huntsman* is alone to blame." (Italics ours.)

In the *Tempus* [1913] P. 166, the *Breiz Huel* and the *Tempus* were approaching on crossing courses, and the *Breiz Huel* sought at the last moment to cross ahead of the *Tempus*, the privileged vessel. Sir Samuel Evans said (171):

"It has been pointed out over and over again that the Court ought to be careful not to cast blame too readily upon a vessel which is placed in difficulty by another vessel. In the first place, the *Breiz Huel* gave no indication at all to the *Tempus* of what she was going to do, up to the very last. Therefore, the *Tempus* was left in doubt as to whether at the very last something would be done by the *Breiz Huel* to avoid collision. I have said that if the *Breiz Huel* had reversed her engines, about a minute or less before the collision, the collision would have been avoided, *and I do not think I ought to cast blame upon the Tempus if she expected, as no doubt she did, that up to that stage something would be done by the other vessel to carry out the obligations placed upon her.* The *Tempus*, in fact, almost immediately afterwards, did take action. She ported her helm to try to avoid the collision. She then, almost as one order, put her engines full speed astern and hard-a-ported. If she had reversed a little earlier than she did, I think it is very doubtful whether the collision would have been avoided." (Italics ours.)

FOURTH POINT

IN VIEW OF THE ALLEGHANY'S GROSS FAULT ANY DOUBTS AS TO THE POMARON'S NAVIGATION SHOULD HAVE BEEN RESOLVED IN HER FAVOR.

This Court has in many cases applied the rule that where the fault of one vessel is gross and sufficient of itself to account for the disaster, any doubts regarding the management of the other vessel or the contribution of her faults to the collision should be resolved in her favor. *The City of New York*, 147 U. S. 72, 85; *The*

Ludvig Holberg, 157 U. S. 60, 71; *The Umbria*, 166 U. S. 404, 409; *The Victory and The Plymothean*, 168 U. S. 410, 423. Had this rule been applied here it can hardly be doubted that the *Pomaron* would have been exonerated. No case, we believe, has ever come before the Courts where the negligence was so gross and inexcusable as that of the *Alleghany*.

This was fully recognized by the Circuit Court of Appeals, but instead of applying the well settled rule of this Court, which would have made it the duty of the Court to resolve any doubts in favor of the *Pomaron*, it proceeded to subject the charge of fault against the *Pomaron* to the closest scrutiny. The Court said:

> "To exonerate either of them under such conditions can be justified only if upon the closest scrutiny of the navigation of each vessel it can be discovered that one of them was free from all culpable blame" (Rec., pp. 294–5; 215 Fed. Rep. 865).

The Circuit Court of Appeals does not place its reversal of the ordinary rule upon the ground that the fault charged against the *Pomaron* was a statutory violation. That Court, however, has frequently had occasion to apply the rule, as, for example, in *The Chicago*, 125 Fed. Rep, 712, and it can hardly be supposed that it was overlooked in deciding this case. Certainly, the point was urged upon the Court in the briefs submitted. It may, therefore, be fairly assumed that the Circuit Court of Appeals declined to apply the rule because of the nature of the fault charged against the *Pomaron*. While it is true that in all the cases in which this Court has laid down that rule, with the possible exception of *The Oregon*, 158 U. S. 186, the faults charged have not been statutory violations, it is submitted that there is no sound reason for failing to apply the rule in all cases. The same reason which

made it unfair and unjust to scrutinize too closely the management of the vessel which had already suffered from the gross misconduct of the other vessel in the cases cited, should lead to the same result where the fault charged is a statutory fault and the Court is asked to determine whether the violation in fact occurred, and whether it contributed to the disaster.

That the rule applies equally in all cases is indicated by the opinion of this Court in *The Oregon*, 158 U. S. 186. It was applied by the Circuit Court of Appeals for the Fourth Circuit in *The Lord O'Neill*, 66 Fed. Rep. 77, 80, and more recently by the same Circuit Court of Appeals in *Gring* v. *Bensten* (Appendix to Petition). This diversity of opinion on such an important subject between the Circuit Court of Appeals for the Second Circuit and the Circuit Court of Appeals for the Fourth Circuit, it is respectfully submitted, presents a proper ground for the exercise of the *writ of certiorari* by this Court.

LAST POINT

IT IS RESPECTFULLY SUBMITTED THAT THE WRIT OF CERTIORARI SHOULD BE GRANTED.

April, 1915.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Petitioner.

CHARLES C. BURLINGHAM,
NORMAN B. BEECHER,
Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1914

FURNESS, WITHY & COMPANY, LIMITED,
(Respondent-Appellant),
Petitioner,

AGAINST

YANG-TSZE INSURANCE ASSOCIATION,
LIMITED, *et al.*
(Libellants-Appellees),
Respondents,

And 14 other Suits

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Furness, Withy & Company, Limited, respectfully shows as follows:

This is a renewal of an application for a writ of *certiorari* to the Circuit Court of Appeals for the Second Circuit. On April 12, 1915, your petitioner presented its petition for the writ under docket No. 921, October Term, 1914, which petition was denied April 19, 1915.

On May 10, 1915, as your petitioner is informed, this Court granted a writ of *certiorari* to the Circuit Court of Appeals for the Ninth Circuit upon the petition of Olaf Lie, master of the Norwegian steamship *Selja*, in a suit between said Olaf Lie, master, etc., and the San Francisco & Portland Steamship Company, etc., said petition being docketed in this Court as No. 928, October Term, 1914.

Your petitioner now renews its application for *certiorari* for the reason that the questions presented by its

petition are identical with those presented by the petition of Olaf Lie. The principal question is whether under this Court's decision in *The Pennsylvania*, 19 Wall. 125, a privileged vessel, which before a collision with a burdened vessel ported her helm in violation (*prima facie*, at least) of Article 21 of the International Regulations may be held responsible for the collision, notwithstanding that it appears as matter of law that the porting was no part of the cause of the collision, and notwithstanding also that the manifest and primary cause of the collision was the gross and unparalleled negligence of the burdened vessel in failing to keep any lookout whatever in the direction of the privileged vessel and not seeing her until collision was unavoidable.

In support of this application your petitioner begs leave to refer to its petition and brief on its original application to this Court, as well as to the petition of said Olaf Lie and the brief in support thereof.

The facts appear at page 3 of your petitioner's original petition. At pages 6 and 7 the questions presented for the consideration of this Court are stated as follows:

"1. Under the rule of *The Pennsylvania*, 19 Wallace, 125, is it sufficient for a vessel charged with a statutory violation to show that the fault did not contribute to the disaster, or must she also show that it could not have done so?

2. Does the burden rest upon a vessel charged with a statutory violation to show that the disaster would have occurred irrespective of any action or inaction on her part?

3. Is it necessary to show that the statutory violation contributed to the disaster, or may the "but for" rule be relied upon to establish liability?

4. Is the rule that in case of gross fault on the part of one vessel any doubts regarding the management of the other vessel or the contribution of her faults, if any, to the collision should be resolved in her favor, inapplicable where the fault charged is a statutory violation?

5. Is the privileged vessel justified in changing her course when there is a distinct indication that the burdened vessel is about to fail in her duty?"

At pages 1 and 2 of the brief in support of the petition of Olaf Lie the question is thus stated:

"The main question for decision is this: If a vessel's reckless and immoderate speed in a dense fog is an admitted fault, and one clearly and indisputably the proximate cause of a collision; can the other vessel, whose fault clearly and indisputably was *not* the proximate cause of the collision, but only a cause *sine qua non*, be also held as a contributor under any proper construction of the '*Pennsylvania Rule*,' or under any other legal or equitable principle of maritime law?"

In their essence the questions in the two cases are thus seen to be the same. In the Olaf Lie case the *Selja* was held to a divided liability for the collision with the *Beaver* because she did not stop her engines sooner after she heard the *Beaver's* whistle in the fog. The *Pomaron* was held liable for the collision with the *Alleghany* because she ported her helm before the collision in order to avoid collision, which then seemed to be inevitable if she did not.

At page 4 of the brief in support of the petition of Olaf Lie it is said:

"As a rule of causation the rule is seen to be a distinct exception to the general rule of proximate cause, but it is clearly made applicable only to such class of cases as show an actual violation effective '*at the time of the collision.*' In all other cases, of course, '*the liability for damage is upon the ship or ships whose fault caused the injury,*' as may be shown through the application of the established and known common law principle of proximate cause."

Like the *Selja*, the *Pomaron* was not violating a statutory rule "at the time of the collision." As your petitioner pointed out at page 7 of its brief, the *Pomaron's* porting did not influence the *Alleghany's* navigation, and the case should therefore have been considered as if the

Pomaron had always been and remained on the course on which her porting placed her.

The importance of the questions involved from the point of view of navigation and commerce, as well as from that of uniformity of decision, was sufficiently dwelt upon in the original petition. If upon the hearing of the writ in the Olaf Lie case this Court should reverse the decision of the Circuit Court of Appeals for the Ninth Circuit, your petitioner conceives that it would likewise be entitled to a reversal of the decision of the Circuit Court of Appeals for the Second Circuit in this case, and that its failure to secure such a reversal would amount to a serious denial of justice. Upon the original application your petitioner did not direct the attention of the Court to the fact that a petition for *certiorari* was to be presented in the Olaf Lie case. The case of the *Pomaron* is in all important aspects so nearly identical with that of the *Selja* that this Court might well in its discretion hear argument on both cases at the same time without any confusion of the issues. The record, which was presented to this Court on the original application, is not voluminous, being of only 300 pages.

Subsequent to the decision of the Circuit Court of Appeals your petitioner instituted proceedings for limitation of liability, which, after the denial by this Court of the original petition, were prosecuted to a decree under which payments were made to the respondents by the Clerk of the District Court. As these payments were made under compulsion they would be recoverable by your petitioner in the event that this court should reverse the decision of the Circuit Court of Appeals.

WHEREFORE your petitioner prays that this Honorable Court will cause a writ of *certiorari* to issue requiring the United States Circuit Court of Appeals for the Second

Circuit to certify the record herein so that this Court may act thereon as of right and according to law ought to be done.

And your petitioner will ever pray.

FURNESS, WITHY & COMPANY, LIMITED,
By BURLINGHAM, MONTGOMERY & BEECHER,
its proctors.

STATE OF NEW YORK,
County of New York, } ss:

EVERETT MASTEN, being duly sworn, deposes and says that he is one of the proctors for the petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge and belief; that the reason why this verification is not made by the petitioner is that the petitioner is not within this District, and deponent is its proctor and familiar with the facts stated in the petition.

EVERETT MASTEN.

Sworn to before me, this
15th day of May, 1915.

ROSCOE H. HUPPER,
[SEAL] Notary Public,
New York Co., No. 1621.

I HEREBY CERTIFY that I have examined the foregoing petition and that in my opinion the same is well founded and is entitled to the favorable consideration of this Court.

Dated, New York, May 17, 1915.

CHARLES C. BURLINGHAM.

SIRS:

TAKE NOTICE that the foregoing petition for a writ of *certiorari* will be presented to the Supreme Court of the United States on Tuesday, June 1st, 1915.

Dated New York, May 17, 1915.

BURLINGHAM, MONTGOMERY AND BEECHER,
Proctors for Petitioner.

To

MESSRS. CONVERS & KIRLIN,
Proctors for Yang-Tsze Insurance Association, Ltd., *et al.*, and Nord-Deutsche Insurance Co., *et al.*

MESSRS. KNEELAND, HARISON & HEWITT,
Proctors for Federal Insurance Co., *et al.*

MESSRS. BARRY, WAINWRIGHT, THACHER & SYMMERS,
Proctors for Walter Oloffson, *et al.*; M. H. Silvera & Hazan & Co.

MESSRS. WILLIAMS & STEVENSON,
Proctors for Boston Insurance Co.

MESSRS. HARRINGTON, BIGHAM & ENGLAR,
Proctors for Walter Despard, Eugene J. F. Coleman, Marshall K. Weidensaul, Francis W. Van Praag, Orton G. Orr, Laura Moore and Louis Bertschmann.

H. SNOWDEN MARSHALL, ESQ.,
Proctor for United States of America.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

FURNESS, WITHY & COMPANY, LIMITED,
Respondent-Appellant, Petitioner,

AGAINST

YANG-TSZE INSURANCE ASSOCIATION, LIMITED,
Libelants-Appellees, Respondents.

No. 106

MEMORANDUM IN BEHALF OF YANG-TSZE INSURANCE ASSOCIATION, LIMITED, AND OTHERS, IN OPPOSITION TO THE SECOND PETITION FOR A WRIT OF CERTIORARI HEREIN.

The petitioner, as owner of the steamship *Pomaron*, presented a petition for a writ of *certiorari* herein on April 12, 1915 (Docket Number 921), which was denied by the Court April 19, 1915. The application is now renewed on the ground that on May 10, 1915, the Court granted a writ of *certiorari* in the case of Olaf Lie, as master of the Norwegian steamship *Selja*, petitioner, against the San Francisco & Portland Steamship Company (Docket Number 928).

I.

There is no real analogy between this case and the case of *The Selja*, in which the Court granted a writ of *certiorari* on May 10, 1915.

The grounds on which the Court granted the writ in the *Selja* case are not stated in any opinion.

It appears to involve a construction of Article 16 of the Collision Rules relating to the speed of vessels in fog and to the duties of a vessel on hearing the fog signal of another vessel forward of the beam, the position of which is not ascertained.

The present case arises under Article 21 of the rules, which requires the privileged vessel, in crossing cases, to "keep her course and speed."

It is evident from these circumstances alone that the analogy between the two cases cannot possibly be close.

In this case, both the courts below have found that the petitioner's vessel, which was in the position of a privileged vessel, on a crossing course, in broad daylight, violated Article 18 by failing to keep her course and speed. If she had kept her course and speed, there would have been no collision. It would be impossible for this Court to decide the case without a re-examination of all the facts, because the legal point which the petition seeks to raise would not arise unless the Court should first decide, on the facts, that the failure of the *Pomaron* to keep her course and speed

did not contribute to the collision. It would only be after such a determination that the Court would be called upon to consider whether the broader statement of the rule announced in *The Pennsylvania*, 19 Wall. 125, and later cases could possibly arise.

There is no foundation for the statement in the petition that the *Pomaron* was not violating a statutory rule at the time of the collision. The undisputed facts are that she had twice changed her course, under a port helm, on approaching the other vessel, and had stopped and reversed her engines. It was also undisputed that she was swinging under a port helm and backing when the collision occurred. *Prima facie*, therefore, she was violating the rule in both particulars when she hit and sank the other vessel.

II.

The case is settled and closed.

After the affirmance, by the Court of Appeals, of the judgment of the District Court for the Southern District of New York, holding the owners of the *Pomaron* in contributory fault for the collision, the petitioner, Furness, Withy & Company, on or about October 5, 1914, filed a petition for the limitation of its liability in the District Court, Southern District of New York, alleging that the cargo claims arising from the collision amounted to upwards of $200,000 and that the value of the *Pomaron* and her pending freight amounted to about $70,400. Such proceedings were had under that

petition that on April 22, 1915, a final decree was entered adjudging that the petitioner was in fault for the collision, but holding that the accident occurred without its privity or knowledge, and limiting its liability to the sum of $93,514.90. The decree further directing that this amount be distributed *pro rata* among the various claimants whose claims were allowed in the decree at various sums, aggregating $220,783.15. The decree provided:

"That the petitioner, Furness, Withy & Company, "Ltd., pay or cause to be paid, into the registry of this "Court * * * an aggregate sum of $93,514.90, in "full payment and settlement of all claims against it "arising from said collision; and the petitioner having "paid into the registry of this Court, concurrently with "the entry of this decree, the said sums * * * "it is further Ordered, Adjudged and Decreed that "the petitioner and its surety be and they hereby are "released from all further liability under the said "stipulation for value filed herein * * * or other-"wise by reason of any matter or thing arising from "or growing out of the said collision * * * and "that all bonds, stipulations for value and stipulations "for costs filed herein by the petitioner or by any "party, be and they hereby are cancelled and dis-"charged of record * * *."

The decree contained the usual provisions entering the default of all persons who had not appeared, and adjudging that all claims which have not heretofore been presented or filed are forever barred, and that the petitioner and the steamship *Pomaron* be discharged

from all liability in respect thereof. It concluded with the provision that the claimants and their several agents, attorneys, proctors and counsel be enjoined from any further action or prosecution of proceedings taken by them in their own behalf or in behalf of others against the petitioner or against the steamship *Pomaron*, except under the decree to recover for the losses, damages and injuries aforesaid, and provided that each claimant, on receiving his share of the limitation fund, should "execute a receipt for the sum so received, "expressly discharging from liability in respect of the "collision aforesaid the steamship *Pomaron*, her owners "and charterers and renouncing any and every right "of action or suit other than as herein against them or "any of them or against the said steamship *Pomaron* "in law and in admiralty in any Court of any country "or jurisdiction."

All the claimants have been paid the respective proportions of the fund ascertained to be due to them, and have executed receipts of discharge in the terms provided by the decree. The case is, therefore, finally closed and settled as between all the parties, and such settlements have been made without any reservation of rights on the part of the petitioner.

Respectfully submitted,

J. PARKER KIRLIN,
Counsel for the Yang-Tsze Insurance Association, Limited.

New York, 28 May, 1915.

5

FURNESS, WITHY & COMPANY, LIMITED, *v.* YANG-TSZE INSURANCE ASSOCIATION, LIMITED, ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 106. Argued December 18, 19, 1916.—Decided January 8, 1917.

Petitions for writs of certiorari are at the risk of the parties making them, and whenever in the progress of the cause facts develop which if disclosed on the application would have induced a refusal, the court may upon motion by a party or *ex mero motu* dismiss the writ.

Such petitions should be carefully prepared, contain appropriate references to the record, and present with studied accuracy, brevity and clearness whatever is essential to ready and adequate understanding of points requiring the court's attention.

When the real situation is not set forth by the petition, a duty rests on opposing counsel to reveal it in their reply.

Writ of certiorari to review 215 Fed. Rep. 859, dismissed.

THE case is stated in the opinion.

Mr. Norman B. Beecher, with whom *Mr. Charles C. Burlingham* and *Mr. Roscoe H. Hupper* were on the briefs, for petitioner.

Mr. D. Roger Englar and *Mr. J. Parker Kirlin*, with whom *Mr. Lawrence Kneeland*, *Mr. John M. Woolsey* and *Mr. William H. McGrann* were on the briefs, for respondents.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The writ of certiorari was improvidently granted and must be dismissed. We should have denied the petition therefor if the facts essential to an adequate appreciation to the situation had then been brought to our attention. Petitions of this character are at the risk of the party making them, and whenever in the progress of the cause facts develop which if disclosed on the application would have induced a refusal, the court may upon motion by a party or *ex mero motu* dismiss the writ. *United States* v. *Rimer*, 220 U. S. 547; *State* v. *Water Commissioners*, 1 Vroom (30 N. J. L.), 247.

In February, 1912, the Yang-Tsze Insurance Association, Limited, filed its libel in the District Court at New York against Furness, Withy and Company, Limited, owner of the Pomaron, to recover damages consequent upon the sinking of the Alleghany. A judgment for libellant rendered June 13, 1913, was affirmed by the Circuit Court of Appeals in June, 1914; and on October 5, 1914, the Pomaron's owner instituted a proceeding in the same District Court for limitation of liability and the steps customary in such causes were regularly taken. April 12, 1915, the petitioner presented an original application here for a writ of certiorari to bring up the judgment of the Circuit Court of Appeals in the damage cause and this was denied April 19th.

It now appears that, on April 22, 1915, a final decree containing the following recitals was entered by the District Court in the limitation proceedings—"Whereas the petitioner and all the claimants herein have compromised and settled the issues between them, and in consideration of the said compromise and settlement it has been agreed between the petitioner and all the claimants:" (The terms follow.) "Whereas in consideration of the said compromise and settlement, the several claimants herein by agreement have fixed and adjusted the amounts of their several losses consequent on the said collision at the following sums, to-wit:" (The amounts are specified.) "Now on the subjoined admissions of correctness of the foregoing recitals and the subjoined consents and waivers of settlement in respect of the entry of this decree made by the proctors for all claimants herein . . . it is ordered, adjudged and decreed," etc.

The following signed by all the proctors is subjoined to the decree: "The undersigned proctors for all the parties herein hereby admit the truth of the recitals contained in the foregoing decree and consent to the entry thereof, without further notice."

Petitioner's second application for certiorari which was presented June 1, 1915, and granted on the 14th of that month, contains these statements:

"On May 10, 1915, as your petitioner is informed, this Court granted a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit upon the petition of Olaf Lie, master of the Norwegian steamship Selja, in a suit between said Olaf Lie, master, etc., and the San Francisco & Portland Steamship Company, etc."

"Your petitioner now renews its application for certiorari for the reason that the questions presented by its petition are identical with those presented by the petition of Olaf Lie. The principal question is whether under this Court's decision in *The Pennsylvania*, 19 Wall. 125, a

privileged vessel, which before a collision with a burdened vessel ported her helm in violation (*prima facie*, at least) of Article 21 of the International Regulations may be held responsible for the collision, . . ."

"Subsequent to the decision of the Circuit Court of Appeals your petitioner instituted proceedings for limitation of liability, which, after the denial by this Court of the original petition, were prosecuted to a decree under which payments were made to the respondents by the Clerk of the District Court. As these payments were made under compulsion they would be recoverable by your petitioner in the event that this Court should reverse the decision of the Circuit Court of Appeals."

In their memorandum opposing the second petition for certiorari, counsel for the Insurance Association said, "The case is settled and closed." And after referring to steps taken in the limitation proceeding and quoting from the decree therein, dated April 22, 1915, they added, "All the claimants have been paid the respective proportions of the fund ascertained to be due to them, and have executed receipts of discharge in the terms provided by the decree. The case is, therefore, finally closed and settled as between all the parties, and such settlements have been made without any reservation of rights on the part of the petitioner."

We were not advised by petition of June 1, 1915, or memorandum opposing it that the final decree in the limitation proceedings was based upon an express compromise agreement; otherwise the writ would not have been allowed. At the hearing counsel expressed different views concerning the ultimate effect of that decree and the reasons for its form; and they made it quite plain that there was no purpose to mislead us. Nevertheless, in the circumstances, we think it was incumbent upon counsel for both sides to see that the petition and reply thereto disclosed the real situation. The oversight has re-

sulted in unfortunate delay and needless consumption of time.

During the last term one hundred fifty-four petitions for certiorari were presented and acted upon. Because of recent legislation—Act of September 6, 1916, c. 448, 39 Stat. 726—their number hereafter may greatly increase. Such petitions go first to every member of the court for examination, and are then separately considered in conference. This duty must be promptly discharged. We are not aided by oral arguments and necessarily rely in an especial way upon petitions, replies and supporting briefs. Unless these are carefully prepared, contain *appropriate* references to the record and present with *studied accuracy, brevity and clearness* whatever is essential to ready and adequate understanding of points requiring our attention, the rights of interested parties may be prejudiced and the court will be impeded in its efforts properly to dispose of the causes which constantly crowd its docket.

Dismissed.